Supreme Court U.S.
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No.

In The Supreme Court of the United States

SHERYL KNIGHT AND STEVE KNIGHT, PETITIONERS
v.
WILLIAM C. BUCKNAM, M.D.

On Petition For Writ of Certiorari
To The Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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134 pp

QUESTIONS PRESENTED FOR REVIEW

Petitioners Sheryl and Steve Knight alleged that defendant William C. Bucknam, M.D. was negligent when he let a patient under his direct care, co-defendant Karl Mueller, drive to the hospital for treatment of a psychiatric emergency, resulting in an automobile crash that left Sheryl Knight disabled. Pursuant to Dr. Bucknam's summary judgment motion, the Washtenaw County Circuit Court ruled that the legislative enactment and judicial enforcement of Michigan's statutory physician-patient privilege, MCL § 600.2157, unconstitutionally deprived Dr. Bucknam of his Due Process rights. The Circuit Court stated that petitioners had presented evidence of Dr. Bucknam's negligence but dismissed the Knights claims because Mr. Mueller's assertion of the statutory privilege precluded Dr. Bucknam from raising an issue of material fact to dispute his negligence. The Michigan Court of Appeals let the Due Process ruling stand without substantive discussion and additionally concluded that petitioners had failed to present sufficient evidence of Dr. Bucknam's negligence. In doing this, the Michigan Court of Appeals applied its own findings of fact to a standard of proof different than the standard imposed by the Circuit Court and by weighing testimonial evidence, without remanding the case for determination of the relevant facts. Thus, the questions presented here for review are:

1. Whether the legislative enactment and judicial enforcement of Michigan's statutory physician-patient privilege, MCL § 600.2157, deprived Dr. Bucknam of his Due Process rights in a manner that justified dismissal of petitioners' claims in this case.

II

2. Whether the Michigan Court of Appeals deprived petitioners of their constitutional rights to due process of law and a jury trial when the court justified a grant of summary judgment by applying its own findings of fact to a standard of proof different than the standard imposed by the Washtenaw County Circuit Court and by weighing testimonial evidence, without remanding the case for factual determination.

III

PARTIES TO PROCEEDINGS

Sheryl Knight and Steve Knight originally filed this action against Karl Otto Mueller in the Washtenaw County Circuit Court, State of Michigan. The Knights subsequently added William C. Bucknam, M.D. as a defendant. The claims against Mr. Mueller were resolved in Washtenaw County Circuit Court Proceedings, and Mr. Mueller was dismissed from the action. The appeal has addressed the Knights' claims against Dr. Bucknam.

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PETITION FOR WRIT OF CERTIORARI

Sheryl Knight and Steve Knight hereby petition for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Michigan Court of Appeals is not reported. The order of the Michigan Court of Appeals denying rehearing is not reported. The order of the Michigan Supreme Court denying the application for leave to appeal is reported at 463 Mich. 972, 623 N.W.2d 596 (2001). The order of the Michigan Supreme Court denying the motion for reconsideration has not been reported. The

opinions and orders of the Washtenaw County Circuit Court are not reported.

JURISDICTION

The decision of the Michigan Court of Appeals was entered on April 28, 2000. A motion for rehearing was denied by the Michigan Court of Appeals on July 21, 2000. The application for leave to appeal to the Michigan Supreme Court was denied on February 26, 2001. *Knight v Mueller*, 463 Mich. 972, 623 N.W.2d 596 (2001). A motion for reconsideration was denied on May 29, 2001. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Michigan Compiled Laws § 600.2157 provides:

Sec. 2157. Physician-patient privilege; waiver. Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon. If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness in the patient's own behalf who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition. If a patient has died, the heirs at law of the patient, whether

proponents or contestants of the patient's will, shall be considered to be personal representatives of the deceased patient for the purpose of waiving the privilege under this section in a contest upon the question of admitting the patient's will to probate. If a patient has died, the beneficiary of a life insurance policy insuring the life of the patient, or the patient's heirs at law, may waive the privilege under this section for the purpose of providing the necessary documentation to a life insurer in examining a claim for benefits.

***

Article I, Section 14 of the Michigan Constitution, provides:

Sec. 14. Jury trials. The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. In all civil cases tried by 12 jurors a verdict shall be received when 10 jurors agree.

***

Article I, Section 17 of the Michigan Constitution, provides:

Sec. 17. Self-incrimination; due process of law; fair treatment at investigations. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

***

The Fifth Amendment of the Constitution states in relevant part that "No person shall be deprived of life, liberty or property without due process of law."

***

The Seventh Amendment of the Constitution states that: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

***

The Fourteenth Amendment to the Constitution states in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This case tests both the constitutionality of a statutory physician-patient privilege and the constitutionality of a court's power to render summary judgment by determining facts.

1. This case arises from an automobile crash that occurred on October 3, 1995. Dr. William C. Bucknam knew a great deal about Karl Mueller's psychiatric condition before that date because Dr. Bucknam had been providing psychiatric treatment to Mr. Mueller for the previous eight years. App. I, *infra*, 30a. Dr. Bucknam reports that Mr. Mueller had a 25-year history with a psychiatric diagnosis of a manic form of

bipolar affective disorder. App. I, *infra*, 29a. To treat this condition, Dr. Bucknam gave Mr. Mueller prescriptions for Tegretol (800 mg/d), Depakote (500 mg/d), and lithium carbonate (600 mg/d). App. I, *infra*, 30a. Despite this medication, Dr. Bucknam states that this disorder manifests itself in Mr. Mueller with manic episodes occurring every two years on average, and these episodes are so severe that they require hospitalization for one-to-two weeks. App. I, *infra*, 30a. Dr. Bucknam notes that these episodes are known to afflict Mr. Mueller with psychiatric delusions, along with poor judgment and bizarre behavior. *Ibid.*

Dr. Bucknam has testified that he relies on a psychiatric reference work entitled Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) in making his diagnosis of this type of psychiatric disorder. App. L, *infra*, 48a. That text indicates that the following criterion is required for the diagnosis of manic episode: "The mood disturbance is sufficiently severe to cause marked impairment in occupational functioning or in usual social activities or relationships with others, or to necessitate hospitalization to prevent harm to self or others, or there are psychotic features." App. M, *infra*, 52a. Poor judgment leading to "reckless driving" is also identified by the DSM-IV as a common feature of the manic episode. App. M, *infra*, 50a.

When Mr. Mueller began feeling the symptoms of manic episode on October 3, 1995, he came to Dr. Bucknam's office. App. J, *infra*, 38a. Mr. Mueller's manic episodes apparently are such that Mr. Mueller does not know it when he is having one. App. J, *infra*, 38a. Mr. Mueller was questioning whether or not he was having a manic episode, so he came to Dr. Bucknam's office and "let him make that decision."

App. J, *infra*, 38a. The decision was made to take Mr. Mueller to St. Joseph Mercy Hospital, a few miles from Dr. Bucknam's office, to be admitted through the emergency room. App. J, *infra*, 38a; App. K, *infra*, 42a-44a. Dr. Bucknam then permitted Mr. Mueller drive his own vehicle in this condition, following Dr. Bucknam to the emergency room as he drove his own vehicle. *Ibid.*

They almost made it. Dr. Bucknam reports that he was able to see Mr. Mueller following him as they proceeded out of the parking lot of Dr. Bucknam's office, down Plymouth Road, then Dixboro Road, and then Huron River Drive. App. K, *infra*, 43a. Dr. Bucknam has testified that the tandem bypassed the general entrance to the hospital, instead proceeding to the emergency entrance. App. K, *infra*, 44a. When he entered the hospital emergency room parking lot, Dr. Bucknam lost track of his patient. App. K, *infra*, 44a. Dr. Bucknam says he waited in the emergency room area for about 20 minutes before realizing that Mr. Mueller was no longer with him, and he then headed back in the direction of his office. *Ibid.* That is when Dr. Bucknam came upon "Karl Mueller's vehicle in the lane of oncoming traffic, where the head-on collision had just occurred." App. K, *infra*, 41a.

Dr. Bucknam originally claimed that he was a "Good Samaritan" stopping to assist at the scene of the accident. App. K, *infra*, 40a. However, Dr. Bucknam also says that he did not approach the driver of the other vehicle involved in the crash, Sheryl Knight, and he did not attempt to make any observations regarding whether Ms. Knight was injured. App. K, *infra*, 42a.

Dr. Bucknam has testified that he told the police officer that Mr. Mueller was having a manic episode. App. K, *infra*, 45a. Dr. Bucknam then drove Mr. Mueller back to the

hospital in Dr. Bucknam's vehicle. App. K, *infra*, 45a. Dr. Bucknam reports that Mr. Mueller was kept in the hospital for this manic episode condition for the next two weeks, from October 3, 1995 to October 16, 1995. App. I, *infra*, 30a.

These facts are all taken from the admissions of Dr. Bucknam in a Psychological Evaluation report he prepared regarding Mr. Mueller's condition shortly after the crash (App. I, *infra*, 27a-32a) and from the deposition testimony of Dr. Bucknam (App. K, *infra*, 39a-45a; App. L, *infra*, 46a-48a) and Mr. Mueller (App. J, *infra*, 33a-38a).

2. The Knights originally filed suit against Mr. Mueller in Washtenaw County Circuit Court, and during the early stages of discovery, Mr. Mueller provided the interrogatory answers attached as Appendix H. In response to a question asking whether he was suffering from any type of medical condition at the time of the accident, Mr. Mueller responded that he is a manic depressive and identified Dr. Bucknam as his treating physician. App. H, *infra*, 25a. Mr. Mueller also noted that he was taking Tegretol by prescription, and he listed Dr. Bucknam as a person who would have relevant information regarding the facts of the case. *Ibid.* After a request for the driving record of Mr. Mueller, the Michigan Department of State provided a copy of the Psychological Evaluation report prepared by Dr. Bucknam to assist Mr. Mueller in restoring his driving privileges. App. I, *infra*, 27a-32a. The deposition of Dr. Bucknam was then taken. App. K, *infra*, 39a-45a. When the extent of Dr. Bucknam's involvement in the events leading up to the crash was ascertained, the Knights added Dr. Bucknam as a defendant. The Knights basically claimed that Dr. Bucknam undertook an unreasonable risk of harm toward third-party drivers such as Ms. Knight when Dr. Bucknam permitted Mr.

Mueller to drive while knowing that Mr. Mueller needed emergency psychiatric hospitalization for his manic disorder, and this type of negligence claim is recognized in Michigan where it was "foreseeable that the actor's conduct might create a risk of harm to the victim." *Duvall v. Goldin*, 139 Mich. App. 342, 352, 362 N.W.2d 275 (1984).

During these proceedings, the Knights filed a motion to deem Mr. Mueller's physician-patient privilege waived in the action, based on the voluntary disclosures already made in answers to interrogatories, depositions, and the Psychological Evaluation report submitted by Dr. Bucknam regarding Mr. Mueller's driving privileges. See Apps. H – K, *infra*, 25a-45a. Under the Michigan Court Rules, MCR 2.314(B)(1), a privilege must be timely asserted in order to avoid waiver, and the Knights argued that Mr. Mueller's failure to assert the privilege before providing medical information in interrogatory answers constituted a waiver of the privilege. Both Mr. Mueller and Dr. Bucknam opposed this motion. The court denied the Knights' motion, ruling that "Plaintiffs may not compel the disclosure of any further information regarding the medical treatment" of Mr. Mueller by Dr. Bucknam. App. C, *infra*, 17a-18a. However, the court also ordered that all of the previously disclosed information contained in the interrogatory answers, depositions, and Psychological Evaluation prepared by Dr. Bucknam was *not* covered by the privilege. *Ibid.*

The Knights asserted that the factual admissions contained in the disclosed records were sufficient for a jury to find Dr. Bucknam liable in negligence under *Duvall*, but also obtained an affidavit opinion from a board-certified psychiatrist, Dr. Gerald Shiener. App. N, *infra*, 54-55a. Dr. Shiener expressly based his opinions on the factual

admissions contained in the previously disclosed report of Dr. Bucknam and the depositions of Dr. Bucknam and Mr. Mueller. App. N, *infra*; 53a-54a; see Apps. I, J, and K, *infra*, 27a-45a. Dr. Shiener stated: "It is my opinion that Dr. Bucknam was negligent in not arranging transportation for this patient, but rather allowing the patient to drive to the hospital in his own vehicle, and this negligence resulted in the accident in which Sheryl Knight was injured." App. N, *infra*, 55. The Knights submitted this affidavit in addition to the previously disclosed deposition testimony and Psychological Evaluation of Dr. Bucknam to oppose the motion.

Before the close of discovery, Dr. Bucknam moved for summary disposition under the M.C.R. 2.116 of the Michigan Court Rules, which provides the same relief as Rule 56 of the Federal Rules of Civil Procedure. The text of Dr. Bucknam's motion is attached at Appendix P, infra, 65a-70a. Dr. Bucknam argued that the court's order denying the Knights' motion to find a waiver of the physician-patient privilege had effectively denied Dr. Bucknam his constitutional Due Process rights under the Fourteenth Amendment and under Article II, Section 16 of the Michigan Constitution. (App. P, *infra*; 70a note: Michigan's due process clause is now embodied in Article I, Section 17 of the Michigan Constitution.) Dr. Bucknam claimed he had a liability defense that he could not disclose or present because of the restrictions of the privilege: "it is those same records and testimonial evidence about his patient-physician relationship with Mr. Mueller which forms the basis for Dr. Bucknam's defense." App. P, *infra*, 67a. Dr. Bucknam also contended that, whenever the physician-patient privilege

was upheld, it necessarily operated as a "shield" against the physician's liability. App. P, *infra*, 69a-70a.

In a derivative argument, Dr. Bucknam asserted that it would be impossible for an expert psychiatrist to develop an adequate factual foundation to support opinion testimony regarding Dr. Bucknam's negligence without full access to his privileged records and thoughts. App. P, *infra*, 68a-69a. Dr. Bucknam sought to support this allegation with an affidavit from Dr. Dan Guyer, but when Dr. Guyer was not made available for deposition, the court struck him as an expert. App. D, *infra*, 20a. Dr. Bucknam submitted no other affidavits or documents in support of his motion. In addition to a brief addressing the constitutional arguments of Dr. Bucknam, the Knights submitted Dr. Shiener's affidavit, the previously disclosed deposition testimony of Dr. Bucknam and Mr. Mueller, and the Psychological Evaluation written by Dr. Bucknam to oppose the motion.

The Opinion and Order of the Washtenaw County Circuit Court, Hon. Melinda Morris, is attached as Appendix B, *infra*,9a-16a. The court first looked at the expert qualification issue raised by Dr. Bucknam, recognizing that this is a matter committed to trial court discretion, but found that the issue was not ripe for review. App. B, *infra*, 12a, citing, *Mulholland v DEC International, Inc*, 432 Mich. 395 (1989)..

The court then decided the case on constitutional grounds, finding that Dr. Bucknam's Due Process rights had been deprived, and that: "Since the heart of the physician's defense is contained in the patient records, the court is compelled to grant defendant Bucknam summary disposition of dismissal of plaintiff's negligence/malpractice claim against him." App. B, *infra*, 14a-16a. In addressing the issue of whether Mr. Mueller's assertion of the privilege

constituted a state action sufficient to invoke Due Process rights, the court stated:

> In accordance with *Shelley v. Kramer*, [334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1948)], the court finds that the action of a state court and its judiciary in upholding the privilege is a state action within the meaning of the fourteenth amendment. *The protection of the fourteenth amendment against infringement by a state extends to judicial as well as legislative action. Shelley*, [92 L.Ed.] at 1169. Further, the physician/patient privilege, as embodied in M.C.L 600.2157, is a state action, sufficient to give rise to Dr. Bucknam's due process rights.

App. B, *infra*, 14a.

The court also recognized that prevailing case law governing this cause of action required plaintiff to prove the following elements:

- "the doctor/patient relationship between Bucknam and Mueller
- that Bucknam had special knowledge of Mueller's condition
- and that it was reasonably foreseeable that Mueller could harm other highway travelers if permitted to drive"

App. B, *infra*, 14a-15a.

The court noted that the Knights had raised evidence of Dr. Bucknam's negligence, but found that this was insufficient "in the face of the privilege which has precluded defendant Bucknam from raising an issue of material fact." App. B, *infra*, 16a. Therefore, because the legislative enactment and judicial enforcement of the statutory physician-patient privilege were viewed as depriving Dr. Bucknam of his Due Process rights to present privileged evidence in his defense, the Knights claims were dismissed.

3. The Knights' challenged this constitutional interpretation on several grounds in their appeal as of right to the Michigan Court of Appeals. First, the Knights argued that the remedy of dismissal of the Knights' claims was wrong, even if Dr. Bucknam's constitutional Due Process rights had been deprived. (Appellants' Brief, at 32.) The Knights noted that, even in criminal cases where the constitutional rights at issue include the Sixth Amendment as well as the Fourteenth Amendment, and even where prosecutorial suppression of evidence gives rise to a clear finding of state action, the remedy is still cautious disclosure and not dismissal. *Ibid;* citing *People v. Stanaway*, 446 Mich. 643, 677, 521 N.W.2d 557 (1994). Because the *Stanaway* procedures are designed to strike "the delicate balance between the defendant's federal and state constitutional rights to discover exculpatory evidence shielded by privilege, and the Legislature's interest in protecting the confidentiality of the therapeutic setting," the Knights argues that the *Stanaway* procedures would provide the appropriate remedy in civil cases as well. Ibid; citing *Stanaway*, 446 Mich. at 678-79. Along these lines, the Knights noted that they were being deprived of their Due Process

rights to a greater extent than Dr. Bucknam under the trial court's ruling:

> If this is the law pertaining to the assertion of the physician-patient privilege in a civil action, then the Knights should be able to overcome the privilege in this case. After all, it is the Knights who challenged the privilege without success, and it is the Knights who are being deprived of their right to a trial as a result of the Trial Court's ruling. If anyone should be able to overcome the privilege asserted by Mr. Mueller on grounds of Due Process deprivation, it is the Knights who have that legitimate claim.
>
> *Ibid; see, Kelly v. Ford Motor Co.*, 280 Mich. 378, 386, 273 N.W. 737 (1937) ("A law which would practically shut out the evidence of a party, and thus deny him the opportunity for a trial, would substantially deprive him of due process of law.")

The Knights also challenged the "state action" finding in light of cases following *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974), and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982). *Ibid*, at 36-38. Next, the Knights argued that Dr. Bucknam had waived his right to a remedy for the constitutional deprivation because Dr. Bucknam knowingly supported the action that allegedly took his Due Process rights. *See, D.H. Overmyer Co., Inc. v. Frick*, 405 U.S. 174, 185-86 (1972). *Ibid*, at 39-40. Finally, the Knights continued their argument that the privilege had been waived by Mr. Mueller sufficiently to permit Dr. Bucknam to use his records, which

would render the constitutional issues moot. *Ibid*, at 41-44. Dr. Bucknam did not file a cross-appeal.

The Michigan Court of Appeals opinion is attached as Appendix A, *infra*, 1a-8a. The Court of Appeals concluded that Mr. Mueller's voluntary responses to discovery requests did not effect a waiver of the physician-patient privilege. App. A, *infra*, 3a-5a. The Court of Appeals then let the constitutional interpretation of the trial court stand without substantive discussion, instead stating: "Even if we were to assume that the trial court erred in granting summary disposition based on Bucknam's due process claim as plaintiffs contend, we conclude that summary disposition was proper under Bucknam's alternative theory – that plaintiffs failed to present sufficient evidence to create a material factual dispute regarding his negligence." App. A, *infra*, 5a-6a. The appellate court then applied a different standard than was first applied by the trial court, now requiring proof that: "(1) the existence of a physician-patient relationship between the physician and the patient who was the cause-in-fact of the plaintiff's injuries (2) breach of the applicable standard of care required by the physician in the treatment of the patient and (3) that the negligent treatment of the patient was the proximate cause of the plaintiff's injuries." App. A, *infra*, 6a. The appellate court then reviewed some of the facts that had been presented in the case, and concluded: "Plaintiffs produced no evidence regarding the type of care Bucknam provided to Mueller the day of the accident or that Bucknam knew at the time he met with Mueller that he was unfit to drive." *Ibid*. The appellate court also found that the affidavit of Dr. Gerald Shiener was "speculative at best," based on the assertion that Dr. Shiener did not perform an independent medical examination of Mr.

Mueller and the evidence upon which he relied did not provide specific information regarding Bucknam's treatment of Mueller." App. A, *infra*, 7a. On this basis, the Michigan Court of Appeals affirmed the dismissal of the Knights claims against Dr. Bucknam. *Ibid.*

The Knights' motion for rehearing argued at length that the appellate court's determination of the facts and weighing the evidence invaded the realm of the jury, thereby depriving the Knights of their constitutional rights to a jury trial under Article 1, Section 14 of the Michigan Constitution and the Seventh Amendment. (Motion for Rehearing, pp. 6-7 and n. 22.) The Knights argued that the appellate court was actually reversing the trial court's finding that there was some evidence of negligence, as well as the decisions regarding review of expert opinion and the standard of proof, without remand and really without any appeal having been filed by Dr. Bucknam. (Motion for Rehearing, pp.9-10.) Among other things, the Knights contended that these rulings deprived the Knights of due process under Article 1, Section 17 of the Michigan Constitution, and under the Fifth Amendment and Fourteenth Amendment. (Motion for Rehearing, p. 10 and n. 30.)

The Michigan Court of Appeals denied the Knights' motion for rehearing without further comment. App. E, *infra*, 22a. The Knights restated each of these constitutional arguments in their application for leave to appeal filed with the Michigan Supreme Court (Application for Leave, pp. 33-65), and when that application for leave was denied, App. F., *infra*, 23a, the Knights again restated their constitutional arguments in a motion for reconsideration. (Motion for Reconsideration, pp. 8-10.) The Michigan Supreme Court

denied the Knights' motion for reconsideration without further comment on May 29, 2001. App. G, *infra*, 24a.

ARGUMENT FOR GRANTING THE WRIT

The constitutionality of a state's statutory physician-patient privilege appears to be a matter of first impression for this Court. Any constitutional limitations would be of significant and widespread interest because the physician-patient privilege is frequently invoked. Similarly, summary judgment is a common judicial tool, and although the procedural requirements have been established by court rules, the constitutional underpinnings of those requirements are less clear. Consequently, it is important for citizens to know the extent to which their constitutional rights limit a court's power to grant summary judgment by finding facts. To answer these fundamental questions, the writ should be granted.

1. If the psychotherapist-patient privilege of *Jaffee v. Redmond*, 518 U.S. 1 (1996), prevented the psychotherapist from raising an otherwise valid defense to a civil action claim for damages, would the psychotherapist be able to overcome the privilege? What is the appropriate remedy for such a situation? These questions are central to this case. In *Jaffee*, this Court held that, "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of Federal Rules of Evidence." *Jaffee* at 15. The Court there observed that such a privilege "promotes sufficiently important interests to outweigh the need for probative evidence...." *Jaffee* at 9-10, *quoting Trammel v. United States*, 445 U.S. 40, 51 (1980). In this case, the trial court has held that the need for probative

evidence to present an unarticulated liability defense not only outweighs the interests protected by the privilege, but also carries the protection of the Due Process Clause of the Fourteenth Amendment. (App. B, *infra*.) The cases are clearly at odds, and some resolution seems warranted.

Like *Jaffee*, many privileges protect only against *compelled* disclosures of confidential information. *See*, *Jaffee* at 15. The privilege can be waived, *Jaffee* at 15 n. 14, and information that is voluntarily disclosed is obviously not confidential and, therefore, not privileged. The intent of the *Jaffee* privilege is to protect confidential communications so that the therapist can help her patients. *Jaffee* at 10-11. In this case, however, the principal thrust of the privilege appears to be immunization of a psychiatrist from seemingly obvious liability. Indeed, Dr. Bucknam's original motion for summary disposition asserts that the privilege is a "shield" to the physician's liability, and that summary disposition must be granted in any case where the privilege is upheld no matter what other facts are in evidence. App. P, *infra*, 69a-70a.

Because of the voluntarily disclosed information available in this case, we know a great deal about what happened on October 3, 1995. We know that Mr. Mueller came to the office of his psychiatrist in an increasingly manic state warranting transport to the emergency room of a hospital for immediate treatment. App J, *infra*, 37a-38a; App. K, *infra*, 43a-44a. We know that Mr. Mueller was being taken to the emergency room for treatment of a manic episode condition that is characterized by psychiatric delusions, bizarre behavior, and poor judgment. App. I, *infra*, 29a-31a We know that Dr. Bucknam felt the need to accompany his patient to the hospital, and we know that Dr. Bucknam

decided to bypass the general entrance to the hospital in hopes of reaching the emergency room entrance. App. K, *infra*, 44a. We also know that Dr. Bucknam let his patient drive under these circumstances. App. K, *infra*, 42a-43a. We cannot fathom why.

Still, Dr. Bucknam claims that he has a secret defense, apparently a justification defense, and he cannot even tell us what it is because Mr. Mueller has asserted the physician-patient privilege and enshrouded the records and thoughts of Dr. Bucknam from disclosure. Dr. Bucknam agrees that the privilege should be applied to hide the records, and at the same time he claims that the application of the privilege has taken his Due Process rights to present evidence in his defense. As Dr. Bucknam puts it:

> 12. While Defendant Dr. Bucknam believes the Court correctly recognized Defendant Mueller's right to exercise his patient-physician privilege and thus restrict from evidence Mr. Mueller's medical records and testimony regarding same, in so doing, it presents a situation in which Dr. Bucknam is unable to receive a fair trial because it is those same records and testimonial evidence about his patient-physician relationship with Mr. Mueller which forms the basis for Dr. Bucknam's defense.
>
> App. P, *infra*, 67a.

This remains all we know about Dr. Bucknam's defense. We would like to know more, and the Knights have done all they can to make Dr. Bucknam's records available to him. However, we continue to question whether the legislative

enactment and judicial enforcement of Michigan's statutory physician-patient privilege, M.C.L § 600.2157, can be construed as a deprivation of Dr. Bucknam's Due Process rights in a manner that justified dismissal of petitioners' claims in this case. We question whether the private assertion of a privilege that is permissively protected by statute can amount to a "state action" in accordance with cases such as *Lugar v. Edmondson Oil*, 457 U.S. 922, 936-37 (1982), which requires that a Due Process deprivation be fairly attributable to a state actor. Mr. Mueller had the exclusive right to assert or waive his privilege, and the fact that the privilege was enacted and protected by the state does not convert Mr. Mueller into a state actor. As noted in *Lugar*, "Without a limit such as this, private parties could face constitutional challenges whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Id.*, *see also*, *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) (applying the same principal in the context of a § 1983 claim).

We also question whether Dr. Bucknam has preserved any right he has to a Due Process remedy in this case, given that Dr. Bucknam supported the enforcement of the privilege that allegedly caused the deprivation rather than challenging that enforcement. There is no question that Dr. Bucknam knew that the privilege would preclude his use of his medical records, or that Dr. Bucknam chose to support application of the privilege. Consequently, it appears that Dr. Bucknam may have waived his rights to a remedy for any alleged deprivation. *D.H. Overmyer v. Frick*, 405 U.S. 174, 185-86 (1972).

Finally, to the extent that Dr. Bucknam's constitutional Due Process rights are jeopardized by the privilege, the

appropriate remedy is cautious disclosure, not dismissal of the Knights' claims. The Knights did not take Dr. Bucknam's constitutional rights. In fact, the Knights tried to open the records for all to use in this case. This is the type of procedure available in Michigan criminal cases, where the Sixth Amendment right of confrontation is implicated in addition to any Fourteenth Amendment right, and the prosecutor's suppression of privileged evidence constitutes state action:

> [O]ur review of the jurisprudence of other states, along with our own precedent in dealing with discovery and evidentiary principles, coupled with a prudent need to resolve doubts in favor of constitutionality, prompts us to hold that in an appropriate case there should be available an *in camera* inspection by the trial judge of the privileged record on a showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense.
>
> *People v. Stanaway*, 446 Mich. 643, 676-77, 521 N.W.2d 557 (1994).

The *Stanaway* procedures would afford access to confidential records in appropriate cases, perhaps under a protective order. *Id.* at 678-79. These procedures provide a reasonable remedy, and thus, there is no basis for dismissing the Knights' claims as a result of Dr. Bucknam's alleged Due Process deprivation.

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2. The Michigan Court of Appeals, though not the trial court, offered a second justification for granting summary judgment based on its findings regarding the facts in this case. The Knights contend that the Michigan Court of Appeals violated their rights to due process and a jury trial in this manner. Like the provisions contained in the Fifth, Fourteenth, and Seventh Amendments, the Michigan Constitution guarantees citizens their rights to due process and a jury trial. Michigan Constitution, Article I, Section 17 and Article I, Section 14. Also like the summary judgment rule under Rule 56 of the Federal Rules of Civil Procedure, Michigan allows for summary judgment in appropriate cases under M.C.R. 2.116 (termed "summary disposition" under the Michigan Court Rules). Rule 56(c) states in part that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

M.C.R. 2.116 provides for summary judgment where, among other things:

> (C)(10) Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

The rules are virtually identical, and like the federal rule, the basic principles guiding the administration of the Michigan rule have been well developed in case law:

> The standard for deciding a motion under M.C.R 2.116(C)(10) is well established. The court must first review all the evidence presented, including any depositions, affidavits, admissions, and pleadings, and then ascertain whether there is any dispute as to a material fact. *Omega Construction Co. v. Altman*, 147 Mich. App. 649 (1985). The test is whether the record which might be developed, giving the benefit of any reasonable doubt to the non-moving party, would leave open an issue upon which reasonable minds differ. *Rizzo v. Kretschmer*, 389 Mich. 363 (1973). The court should be liberal in finding a question of material fact. *Livonia v. Department of Social Services*, 84 Mich. App. 724 (1978). Even if the underlying evidentiary facts are not in dispute, when the inferences that can be drawn from them are such that reasonable people can differ, an issue of fact exists. *Bardoni v. Kim*, 151 Mich. App. 169 (1986).
>
> App. B, infra, 13a – 14a.

These principles appear identical in substance to the federal cases articulating the basis for granting summary judgment. See, *Kodak v. Image Technical Svcs.*, 504 U.S. 451, 456 (1992); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Arizona v. Maricopa County Medical*

Society, 457 U.S. 332, 229 (1982). Like Michigan law, for example, these cases incorporate the principle that "[t]he evidence of [petitioners] is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Anderson*, at 255. We contend that these principles are not mere jurisprudential developments, but rather, they are requirements necessary to preserve the constitutionally protected rights of citizens to due process and a jury trial. So when *Anderson* recited the principle that "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial," *Id.* at 249, this should be seen as an important protection of constitutional rights.

The trial court in this case noted that the Knights had presented "some evidence of defendant's negligence," and that Dr. Bucknam could not counter it because the privilege "precluded defendant Bucknam from raising an issue of material fact." App. B, *infra*, 16a. On review, the Michigan Court of Appeals essentially reversed course: "Even if we were to assume that the trial court erred in granting summary disposition based on Bucknam's due process claim as plaintiffs contend, we conclude that summary disposition was proper under Bucknam's alternative theory – that plaintiffs failed to present sufficient evidence to create a material factual dispute regarding his negligence." App. A, *infra*, 6a. The only factual issue actually presented by Dr. Bucknam's motion related to the foundational requirements for expert testimony, claiming that access to the privileged records of Dr. Bucknam was necessary for any expert to render an opinion in the case, and this became the focus of the appellate inquiry as well. App. P, *infra*, 67a-70a; App. A, *infra*, 6a-7a. The result is a myriad of shifting standards and

factual determinations by the appellate court, resulting in the loss of the Knights' rights to due process and a jury trial.

The expert qualification issue was addressed, but not decided, by the trial court because Dr. Bucknam had not presented anything for the court to review. App. B, *infra*, 12a. The court first correctly noted that the issue of expert qualification is committed to the discretion of the trial court. *Ibid*, citing *Mulholland v. D.E.C. International, Inc.*, 432 Mich. 395 (1989). The court then noted that defendant had not presented anything for the court to review in relation to the issue, and therefore, determined that the argument was premature. *Ibid*. This decision was not cross-appealed by Dr. Bucknam, and if it were appealed, "[a]ppellate courts will interfere with a trial court's ruling in this regard only to correct an abuse of discretion." *Mulholland* at 402, citing *People v Gambrell*, 429 Mich. 401, 407; 415 N.W.2d 202 (1987). Nevertheless, the Michigan Court of Appeals reviewed this matter *de novo*, changing the standard of proof, and then determining that the expert's opinion was "speculation at best" because the factual evidence upon which he relied "did not provide specific information regarding Bucknam's treatment of Mueller." App.A, infra, 6a-7a. This issue should not have been reviewed, and if anything, it should have been remanded. Even assuming *de novo* review was somehow appropriate, the facts should be viewed in the light most favorable to the Knights. *Livonia*, supra; *Bardoni*, supra.

It is important to realize that the facts discussed by the appellate court here are actually the factual admissions contained in the depositions of Dr. Bucknam and Mr. Mueller, and in Dr. Bucknam's own Psychological Evaluation report. See, Apps. I-L, *infra*, 27a-48a. Dr.

Shiener's opinion was based expressly on the admissions of fact contained in these documents. App. N, *infra*, 54a-55a. The appellate court is nevertheless *weighing* this testimony to determine whether it is renders the expert testimony credible. Astonishingly, the appellate court is deciding that Dr. Bucknam's own Psychological Evaluation report regarding Mr. Mueller does not provide a reliable basis for determining that Dr. Bucknam knew the facts recited in that report. We are being asked to conclude that the admitted facts contained in Dr. Bucknam's deposition testimony are merely speculative. The Knights contend that they are protected from this type of judicial conclusion by virtue of their rights to a jury trial under Article I, Section 14 of the Michigan Constitution (in effect, identical to the rights provided under the Seventh Amendment), and by the due process provisions of Article I, Section 17 of the Michigan Constitution, the Fifth Amendment, and the Fourteenth Amendment.

After all, we *know* that Mr. Mueller submitted himself to the care of Dr. Bucknam due to concerns about the onset of a manic episode. App. J, *infra*, 37a-38a. We *know* that Dr. Bucknam was fully aware of Mr. Mueller's history, including the psychiatric delusions, bizarre behavior, and poor judgment. App. I, *infra*, 29a-31a. We *know* that Dr. Bucknam decided the symptoms were serious enough to warrant admission to the emergency room for psychiatric hospitalization. App. K, *infra*, 43a-44a. We *know* that Dr. Bucknam said Mr. Mueller had been having a manic episode. App. K, *infra*, 45a. These admitted facts are certainly sufficient to support the conclusion of an expert, or the inference by a jury, that "Dr. Bucknam was negligent in not arranging transportation for this patient, but rather

allowing the patient to drive to the hospital in his own vehicle." App. N, *infra*, 55a. Indeed, the underlying *Duvall* case specifically contemplates this type of breach:

> Here, one of the alleged breaches of duty involves the defendant's failure to inform his patient not to operate a motor vehicle. The likelihood of injury to a third party due to an automobile accident arising from that breach is not so rare or unusual an occurrence as to be considered unforeseeable.

Duvall, 139 Mich. App. at 352.

In arriving at its conclusion in this case, the Michigan Court of Appeals also shifted the standard of proof that the Knights would need to meet to survive summary judgment. The trial court stated that the burden required the Knights to prove that it was reasonably foreseeable that Mueller could harm other highway travelers if permitted to drive. App. B, *infra*, 15a. The Michigan Court of Appeals recited a different standard, requiring proof of breach of the applicable standard of care required by the physician in the treatment of the patient." App. A, *infra*, 6a. Both of these standards are objective standards of care, but like a moving target, the appellate court then examined the facts in terms of a subjective standard, concluding that the Knights had not proven that "Dr. Bucknam knew at the time he met with Mueller that he was unfit to drive." App. A, *infra*, 7a. Even this standard, more akin to intentional torts or gross negligence, is met by the facts of this case. Dr. Bucknam knew Mr. Mueller was susceptible to delusions, among other things, and knew that he needed to get Mr. Mueller to the

emergency room for treatment of the condition that produces those delusions. Finally, the appellate court suggests that Dr. Shiener's opinion, based directly on the admissions of fact by Dr. Bucknam, lacks a proper foundation because Dr. Shiener "did not independently examine Mueller." App. A, *infra*, 7a. It is unclear how the appellate court would expect an examination of Mr. Mueller to alter the factual admissions of Dr. Bucknam or give us more information about what Dr. Bucknam knew at the time of the accident. Moreover, the appellate court's analysis clearly would place Mr. Mueller's medical condition "in controversy," but the appellate court found that Mr. Mueller had not waived his privilege precisely because his condition was not "in controversy." App. A, *infra*, 5a.

Like federal law, Michigan law holds that "[I]t is for [the jury], and not for the court to compare and weigh the evidence ." *Jim-Bob, Inc. v. Mehling*, 178 Mich. App. 71, 85-86, 443 N.W.2d 451, 457-58 (1989). We contend that this is as much a constitutional right as matter of jurisprudence. In this case, the Michigan Court of Appeals has reached out to find the facts, going so far as to negate factual admissions and to compare and weigh the evidence against a shifting set of standards, without remanding the case for proper factual determination. In doing so, the Michigan Court of Appeals has deprived petitioners of their constitutional rights to due process of law and a jury trial. If anyone is going to decide that Dr. Bucknam was not negligent under the admitted facts of this case, it justly ought to be a jury.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 23, 2001

APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

SHERYL KNIGHT and STEVE KNIGHT,

Plaintiffs-Appellants,

V

KARL OTTO MUELLER,

Defendant,

and

WILLIAM C. BUCKNAM, M.D.,

Defendant-Appellee.

UNPUBLISHED
April 28, 2000

No. 212478
Washtenaw Circuit Court
LC No. 96-002725-NI

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting of summary disposition in favor of defendant William C. Bucknam, M.D. pursuant to MCR 2.116(C)(10). We affirm.

This appeal arises out of an automobile accident that occurred in Ypsilanti on October 3, 1995. Karl Mueller was traveling on Dixboro Road when his vehicle crossed the center lane and collided with a vehicle driven by plaintiff Sheryl Knight, which was traveling in the opposite direction. When the police arrived at the scene ten to fifteen minutes later, Mueller told them that "he could not explain why he was on the wrong side of the road" and that he was "having a manic episode."[1]

Defendant Bucknam had treated Mueller for his psychiatric disorder for over eight years and, on the day of the accident, the two had met at Bucknam's office. Bucknam

then drove to the hospital, with Mueller following in his own car. When Bucknam arrived at the hospital, he noticed that Mueller had not followed him into the parking lot, so he retraced the route and eventually arrived at the accident scene. After speaking with Mueller at the scene, Bucknam told a police officer that Mueller was "having a manic episode." About a month after the accident, Bucknam completed a psychiatric evaluation at Mueller's request and submitted it to the Secretary of State for the purpose of restoring his driving privileges.

Plaintiffs initially sued only Mueller, alleging that he was negligent in failing to yield the right of way to southbound traffic. During discovery, Mueller did not assert his psychiatric condition as a defense to the accident and admitted negligence. Both Mueller and Bucknam were subsequently deposed for the purpose of establishing plaintiffs' damages. At the depositions, Mueller's counsel objected to questions concerning his medical condition or treatment based on the physician-patient privilege either at the outset or in response to specific inquires, and confirmed that Mueller would not waive the privilege. Plaintiffs then amended the complaint to add Bucknam as a defendant, alleging that his special relationship with Mueller gave rise to a duty to protect third persons who might be foreseeably injured by Mueller's unsafe driving and that he breached that duty.[2] In response to the allegations against Bucknam, Mueller asserted the physician-patient privilege as a bar to any inquiry concerning his psychiatric condition or treatment.

Plaintiffs subsequently filed a motion to deem the physician-patient privilege waived on grounds that Mueller had voluntarily disclosed information concerning his condition and treatment during discovery. The trial court denied the motion, ruling that any information regarding Bucknam's treatment of Mueller that Mueller had already disclosed (i.e., answers to interrogatories and deposition questions, and documents submitted to the Secretary of

State) remained unprivileged, but that plaintiffs could not "compel the disclosure of further information." Bucknam moved for summary disposition, arguing that the trial court's decision to uphold the privilege, although proper, would result in a denial of due process because it would prevent him from introducing evidence necessary to defend against plaintiffs' claims, and alternatively, that plaintiffs could not establish a prima facie case of negligence without such evidence. Plaintiffs filed a response and moved for partial summary disposition under MCR 2.116(I)(2), contending that Bucknam's admissions in his deposition and other evidence established his liability as a matter of law. The trial court granted summary disposition for Bucknam based on the due process theory, and expressly declined to review plaintiff's motion for summary disposition.[1]

On appeal, plaintiffs argue that the trial court abused its discretion in concluding that Mueller did not waive the physician-patient privilege with respect to medical information not disclosed during discovery. We disagree. This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion. *Dorris v Detroit Osteopathic Hospital Corp*, 220 Mich App 248, 250; 559 NW2d 76 (1996).

The physician-patient privilege prohibits a physician from disclosing information acquired when attending a patient in a professional character if the information was necessary to enable the physician to prescribe for the patient as a physician. MCL 600.2157; MSA 27A.2157; Dorris v Detroit Osteopathic Hospital Corp, 460 Mich 26, 33 ; 594 NW2d 455 (1999). The purpose of the privilege is to protect the confidential nature of the physician-patient relationship and to encourage a patient to make full disclosure of symptoms and conditions. *Id.* In addition to the statutory privilege, the court rules contain several provisions regarding the discovery of medical information. MCR 2.314(A)(1)(b) provides in part that, "[w]hen a mental or physical condition of a party *is in controversy*, medical

information is subject to discovery under these to the extent that ... the party does not assert that the information is subject to a valid privilege." (Emphasis added). See also *Domako v Rowe*, 438 Mich 347, 354; 475 NW2d 30 (1991).

The privilege belongs to the patient and, once asserted, can be waived only by the patient. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 276; 568 NW2d 411 (1997). A true waiver is an intentional, voluntary act, which has been defined as the "voluntary relinquishment of a known right." *Kelly v Allegan Circuit Judge*, 382 Mich 425, 427; 169 NW2d 916 (1969); *Dorris, supra* at 39. MCR 2.314(B)(1) also permits an implied waiver when the patient fails to timely assert the privilege in the party's written response to a request for production of documents, in answers to interrogatories, before or during the taking of a deposition, or by moving for a protective order. See also *Landelius v Sackellares*, 453 Mich 470, 475; 566 NW2d 472 (1996); *Domako, supra* at 354-355.

Plaintiffs' contention that Mueller waived the privilege when he voluntarily disclosed information regarding his medical condition and treatment on three occasions during discovery lacks merit. Plaintiffs first refer to medical information contained in the psychological evaluation Bucknam submitted to the State for the purpose of restoring Mueller's driving privileges. However, we find no waiver where, as here, the disclosure was made before the suit against Mueller had been filed, Mueller only authorized the release of information to the State for a specific purpose, and plaintiffs subpoenaed the report from the State. See also *Kelly, supra* (a physician's letter to the defendant insurance company describing the medical condition of the insured did not effect a waiver of the physician-patient privilege). Nor can we conclude that Mueller's responses to interrogatories constituted an intentional relinquishment of the privilege. The answers merely provided basic information regarding his present condition, treating physician's name, and mediation; they

did not include specific details regarding either his treatment or his condition on the day of the accident. Further, because Mueller's condition was not "in controversy" at the time he responded to the interrogatories, the implied waiver provisions contained within MCR 2.314(B)(1) did not apply. Cf. *Domako, supra*; see also *LeGendre v Monroe County*, 234 Mich App 708; 600 NW2d 78 (1999).

Plaintiffs also assert that Mueller waived the privilege by discussing the psychological condition and treatment during his deposition. In the portion of the deposition to which plaintiffs refer, Mueller testified that he had Bucknam complete the evaluation to the State and confirmed that the statements therein were accurate; that on the day of the accident he questioned whether he was entering into a manic episode and saw Bucknam to allow him to make the determination; and, that he thought the accident occurred just before or at the beginning of a manic episode. Again, we cannot conclude that this testimony expressly or impliedly waived the privilege where Mueller did not provide specific information regarding his treatment on the day of the accident, his counsel announced at the outset that Mueller would not waive the privilege, and his counsel objected to inquiry regarding medical information which had not been previously disclosed.[4] Accordingly, the trial court correctly determined that the privilege had not been waived.

Next, plaintiffs argue that the trial court erred in granting Bucknam's motion for summary disposition. We disagree. This Court reviews a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion brought pursuant to MCR 2.116(C)(10), the court considers the documentary evidence in the light most favorable to the unmoving party. *Id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is appropriate where there is no genuine issue of material

fact and the moving party is entitled to judgment as a matter of law. *Id.* At 454-455, quoting *Quinto supra* at 362.

Even if we were to assume that the trial court erred in granting summary disposition based on Bucknam's due process claim as plaintiffs contend, we conclude that summary disposition was proper under Bucknam's alternative theory – that plaintiffs failed to present sufficient evidence to create a material factual dispute regarding his negligence. See *Phinney v Perlmutter*, 22 Mich App 513, 532; 564 NW2d 532 (1997) (reversal is not required where the trial court reaches the right result for the wrong reason). In order to establish a claim of negligence against a defendant physician for injuries caused by the patient to a third-party, the plaintiff must show (1) the existence of a physician-patient relationship between the physician and the patient who was the cause in-fact of the plaintiff's injuries (2) breach of the applicable standard of care required by the physician in the treatment of the patient and (3) that the negligent treatment of the patient was the proximate cause of the plaintiff's injuries. *Welke v Kuzilla*, 144 Mich App 245, 252-253; 375 NW2d 403 (1985); *Duvall v Goldin*, 139 Mich App 342, 350-352; 362 NW2d 275 (1984).

Here, plaintiffs submitted documentary and testimonial evidence establishing: that Bucknam had treated Mueller for several years and knew that he had a history of manic episodes that were characterized by "impaired judgment, delusion, bizarre behavior"; that Bucknam knew that the episodes occurred every two years and required hospitalization for one to two weeks, and that Mueller was asymptomatic between episodes; that Mueller submitted himself to Bucknam's care on the day of the accident because he was not sure whether he was experiencing the onset of a manic episode; that after meeting with Bucknam, the two drove to the hospital in separate vehicles; that the accident occurred while on route to the hospital; and that after Bucknam arrived at the scene of the accident and spoke with Mueller, he told the police that Mueller was having a manic

episode.[5] While this evidence shows the existence of a patient-physician relationship, plaintiffs failed to present evidence establishing that Bucknam breached the standard of care. Plaintiffs produced no evidence regarding the type of care Bucknam provided to Mueller the day of the accident or that Bucknam knew at the time he met with Mueller that he was unfit to drive. Although plaintiffs offered an affidavit from an expert's psychiatrist in which he opined that Bucknam was negligent in allowing Mueller to drive to the hospital in his own vehicle, his conclusion was speculation at best. Plaintiff's expert did not independently examine Mueller and the evidence upon which he relied did not provide specific information regarding Bucknam's treatment of Mueller. See *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 485-486; 502 NW2d 742 (1993) (a party opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of proving evidentiary proof establishing a genuine issue of material fact); see also *Garabedeian v Wm Beaumont Hospital*, 208 Mich App 473, 475-476; 528 NW2d 809 (1996). Accordingly, we conclude that the trial court's grant of summary disposition was proper.

Given our disposition of this issue, we need not reach plaintiffs' claim that summary disposition should have been granted in their favor.

Affirmed.

s/ Harold Hood

s/ Michael R. Smolenski

s/ Michael J. Talbot

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[1] At deposition, Mueller testified that did not recall making the statement to the police and that he believed the accident occurred just before or during the beginning stages of the manic episode.

[2] Specifically, plaintiffs alleged that Bucknam was negligent in failing to diagnose and recognize the severity of Mueller's condition; failing to recognize that the condition prevented Mueller from driving safely; failing to take measures to prevent injury to persons who might be injured by Mueller's unsafe driving; failing to use alternative means of transportation; failing to inform Mueller that he should not drive a vehicle while he was experiencing the condition; and, permitting Mueller to drive while he was under care for an emergency psychotic condition.

[3] Mueller settled with plaintiffs and is not a party to this appeal.

[4] The authority upon which plaintiffs rely for the proposition that prior disclosures waive the privilege are distinguishable. In those cases, privilege was deemed waived where, unlike the present case, the individuals sought to assert the privilege after they had expressly authorized the release of medical records to opposing parties. *Landelius, supra; Domako, supra.*

[5] Plaintiffs also rely on an excerpt from a medical textbook, which states that "reckless driving" is a common feature of manic episodes. Although Bucknam testified at deposition that he relied on the textbook in diagnosing and treating the condition, there is no indication that the excerpt was submitted to the trial court and therefore may not be considered on appeal. MCR 7.210(A); *Reeves v Kmart Corp*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998).

APPENDIX B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASTENAW

SHERYL KNIGHT and STEVE KNIGHT,
Plaintiff,

v

Case No. 96-2725-NI
Honorable Melinda Morris

KARL OTTO MUELLER, and
WILLIAM C. BUCKNAM, M.D.,
Jointly and Severally,
Defendant.

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OPINION AND ORDER GRANTING DEFENDANT BUCKNAM'S

MOTION FOR SUMMARY DISPOSITION

At a Session of the Court held in the
Washtenaw County Courthouse in
the City of Ann Arbor on
February 12, 1998

PRESENT: HONORABLE MELINDA MORRIS, Circuit Judge

The matter before the court arises from a plaintiff's automobile negligence action filed against the driver of the other automobile involved in the collision and his psychiatrist. The allegation against Dr. Bucknam, who had treated defendant Mueller on the day of the accident, is that he was negligent in that he *knew or should have known that Mr. Mueller was suffering from a serious psychiatric disorder...and would pose an increased risk of injury to other persons if he were permitted to drive.*

The Court has previously denied plaintiff's motion to deem the physician patient privilege waived insofar as it pertains to information and documents not previously disclosed.

Defendant Bucknam now brings a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant argues that considering the court's previous rulings that plaintiff can bring a third party claim grounded in negligence against defendant Bucknam based on his relationship with defendant Mueller, and that defendant Mueller may assert his patient-physician privilege as it pertains to his medical records and treatment with Dr. Bucknam (which is not disputed), defendant Bucknam is placed in a position where he cannot present pertinent evidence on his own behalf, which results in a violation of his due process rights. *Kelly v. Ford Motor Company,* 280 Mich 378 (1937).

Further, without any evidence of Mr. Mueller's treatment with Dr. Bucknam, any testimony presented by

Plaintiffs' expert witnesses would be pure speculation. Where plaintiff's case is solely based on speculation, summary disposition or directed verdict is proper. *Garabedian v. William Beaumont Hospital*, 208 Mich App 473, *lv den* 450 Mich 985 (1996).

Defendant argues the plaintiff must prove a breach of the applicable standard of care by Dr. Bucknam in the treatment of Mr. Mueller. *Welke v. Kuzilla*, 144 Mich App 245 (1985). Without the requisite foundation and knowledge contained in the treatment records, no witness can offer a credible opinion as to the propriety of Dr. Bucknam's actions in allowing Mr. Mueller to drive.

Finally, defendant argues that no Michigan court in a similar situation has both upheld the patient-physician privilege and denied the physician summary disposition.

In *Landelius v Rafko*, 453 Mich 470 (1996), the Michigan Supreme Court recognized that it should either uphold the patient-physician relationship and thus affirm the granting of defendant's motion for summary disposition, as the plaintiff could not establish a *prima facie* case without such records, or find the patient-physician privilege had been waived thus allowing access to the medical records at issue.

In *Landelius* the Supreme Court reversed the finding that the defendant doctor was entitled to summary disposition, but it did so only on the basis that the privilege had been waived.

Thus defendant concludes that because the privilege is intact, Dr. Bucknam is unable to defend and plaintiff is unable to show a breach of the standard of care. Summary disposition as to Dr. Bucknam is required.

Plaintiff responds that there must be a finding of *state action* before a claimed due process violation may be redressed. see *Shavers v. Kelly* 402 Mich 554 (1978). In order to raise a due process argument, there must be a sufficiently

close nexus between the state and the challenged action so that the acts may be fairly treated as those of the state itself. *People v. Farrow*, 183 Mich App 436, (1990). Where there is an insufficient allegation of state action, a due process argument necessarily fails. *Ferrell v. Vic Tanny International, Inc.*, 137 Mich App 238, (1984).

Even if his due process argument is accepted, Dr. Bucknam's acquiescence in defendant Mueller's assertion of privilege would constitute a waiver of defendant Bucknam's due process rights. See, *D.H. Overmyer Co. v. Frick*, 405 U.S. 174, 185-86, 31 L.Ed. 124, 92 S.Ct. 775 (1972).

As to the expert qualification issue, trial courts have great discretion regarding the admissibility of expert testimony. *Mulholland v. DEC International, Inc.* 432 Mich. 395 (1989).

To exercise that discretion the court must review the testimony offered by the proposed expert. As defendant has presented no testimony, there is nothing for the court to review. This aspect of defendant's argument s premature.

Further, plaintiff argues it is she who is entitled to partial summary disposition with regard to the liability of Dr. Bucknam. The applicable case law is recited in *Duvall v. Goldin* 139 Mich App 342 (1984) and followed in *Landelius v. Sackellares*, 453 Mich 470 (1996). In the instant case, the nexus between defendant Bucknam's negligence and defendant Mueller's driving is even closer. Further, Dr. Bucknam provided a physician's statement for defendant Mueller to obtain a reinstatement of his driving privileges subsequent to the accident. Dr. Bucknam's diagnosis was a psychiatric illness identified as bipolar affective disorder, manic, in remission. Further, he stated:

> *Approximately 25 year. Hx. of above diagnosis, manifested by manic episodes with frequency of every 2 years, on average.* ***During a manic episode he has impaired judgment, delusions and bizarre behavior.***

> ***Episodes require hospitalization for 1-2 weeks.*** (Emphasis added).

Dr. Bucknam has also testified that at the accident scene he told the police officer that Mr. Mueller was having a manic episode. Clearly, plaintiff argues, defendant Bucknam nevertheless allowed defendant Mueller to drive, foreseeably endangering other drivers such as plaintiff, Sheryl Knight. This is exactly the type of liability contemplated in *Duvall*, supra, and plaintiffs ask the Court to render partial judgment as a matter of law pursuant to MCR 2.116(C)(10) and MCR 2.116(I)(2), establishing defendant Bucknam's liability for the car crash which injured plaintiff.

Defendant's reply asserts that the patient-physician privilege is a *state action* having been created by the legislature and embodied as statutory law. Further, this Court is a *state actor* and its rulings are *state actions*. *Shelley v. Kramer*, 334 US 1, 92 L Ed 1161, 68 S Ct 836 (1948). *Shelley* states in pertinent part:

> *The courts may not be used to destroy rights which are protected against infringement or deprivation by the constitutional guarantees of due process and equal protection of the laws. Moreover, the protection of the Fourteenth Amendment against infringement by a state extends to judicial as well as legislative action.*

The standard for deciding a motion under MCR 2.116(C)(10) is well established. The court must first review all the evidence presented, including any depositions, affidavits, admissions, and pleadings, and then ascertain whether there is any dispute as to a material fact. *Omega Construction Co. v. Altman*, 147 Mich App 649 (1985). The test is whether the record which might be developed, giving the benefit of any reasonable doubt to the non-moving party,

would leave open an issue upon which reasonable minds differ. *Rizzo v. Kretschmer*, 389 Mich 363, (1973). The court should be liberal in finding a question of material fact, *Livonia v. Department of Social Services*, 84 Mich App 724 (1978). Even if the underlying evidentiary facts are not in dispute, when the inferences that can be drawn from them are such that reasonable people can differ, an issue of fact exists. *Bardoni v. Kim*, 151 Mich App 169 (1986).

In accordance with *Shelley v. Kramer*, supra, the court finds that the action of a state court and its judiciary in upholding the privilege is a state action within the meaning of the fourteenth amendment. *The protection of the fourteenth amendment against infringement by a state extends to judicial as well as legislative action, Shelley*, at 1169. Further, the physician/patient privilege, as embodied in MCL 600.2157, is a state action, sufficient to give rise to Dr. Bucknam's due process rights.

Bucknam has not waived his due process right by acquiescing to the privilege. The privilege belongs to the patient, Mr. Mueller. The privilege was created by the legislature. Whether or not Dr. Bucknam agrees with and supports Mr. Mueller's right to the privilege is immaterial to his own due process rights.

The more important issue is whether Dr. Bucknam's due process rights are violated because he is unable to testify to his treatment of defendant Mueller in the face of the physician/patient privilege.

In *Duvall v. Goldin*, supra, the Court of Appeals addressed the same question as in the instant case, i.e. is a physician liable to third persons injured as a result of a physician's negligence in treating a patient who, as a result of his medical condition, causes an automobile accident involving third persons? On the narrow facts of that case where the privilege was not asserted, the court found liability. See also, *Landelius v. Sackellares*, 453 Mich 470 (1996) where the court found the privilege had been waived.

There is no question that liability to third parties may be established under a theory of medical malpractice, *Welke v. Kuzella* (citation omitted), or ordinary negligence *Duvall v. Goldin*, supra.

- Plaintiff must prove:
    - the doctor/patient relationship between Bucknam and Mueller
    - that Bucknam had special knowledge of Mueller's condition
    - and that it was reasonably foreseeable that Mueller could harm other highway travelers if permitted to drive

Since Mueller has asserted the privilege (paragraph 17 of Mueller's answer to 2nd amended complaint), the court is required to exclude any evidence of Bucknam's treatment of Mueller. The court stated in *Kelly v. Ford Motor Company* that:

> *A law which would practically shut out the evidence of a party and denies opportunity for (defense), would substantially deprive him of due process.*

Plaintiff argues that Mueller waived his privilege when he allowed Dr. Bucknam to submit a physician's statement on his application to the Secretary of State for restoration of his driving privileges. The court disagrees. Once timely asserted, the privilege is only waived expressly or by estoppel when a patient seeks to shield information from the same person as to whom it was earlier disclosed. *Landelius*, supra. A Secretary of State application is not such a disclosure.

The overriding rationale of the physician/patient privilege is to encourage patients to freely divulge

symptoms and conditions without fear that the information will be disclosed and embarrass or damage the patient.

In conclusion, it is clear that Mueller timely asserted his privilege, never waived it, and there being no evidence of collusion between the doctor and patient, the court must uphold the privilege. Since the heart of the physician's defense is contained in the patient records, the court is compelled to grant defendant Bucknam summary disposition of dismissal of plaintiff's negligence/malpractice claim against him.

IT IS THEREFORE ORDERED that defendant Bucknam's motion for summary disposition is **granted**. In so doing, the court has not addressed plaintiff's motion for partial summary disposition. Even though some evidence of defendant's negligence appears on the record, such evidence is insufficient to allow summary disposition particularly in the face of the privilege which has precluded defendant Bucknam from raising an issue of material fact.

SUMMARY DISPOSITION IS GRANTED.

s/Melinda Morris
Honorable Melinda Morris
Circuit Judge

APPENDIX C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASTENAW

SHERYL KNIGHT and STEVE KNIGHT,

Plaintiffs,

Case No. 96-2725-NI

v

HON. MELINDA MORRIS

KARL OTTO MUELLER, and
WILLIAM C. BUCKNAM, M.D.,
jointly and severally,

Defendants.

_____/

CHARLES N. SIMKINS (P24990)
ROBERT B. JUNE (P 51149)
SIMKINS & SIMKINS, P.C.
Attorneys for Plaintiffs
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Northville, Michigan 48167-1416
(810) 349-6030

DENNIS M. KILLEEN (P29773)
BECKER, LANCTOT, McCUTCHEON,
SCHOOLMASTER, TAYLOR & HOM
Attorneys for Defendant, Karl Otto Mueller
1700 First Federal Building
Detroit, Michigan 48226
(313) 237-5658

JOHN PATRICK O'LEARY (P18464)
KEVIN P. HANBURY (P39468)
O'LEARY, O'LEARY, JACOBS, MATTSON,
PERRY & MASON
Attorneys for Defendant, William C. Bucknam, M.D.
26777 Central Park Boulevard, Suite 275
Southfield, Michigan 48076-4165

(810) 948-1000

_____/

ORDER DENYING PLAINTIFF'S MOTION TO DEEM PHYSICIAN PATIENT PRIVILEGE WAIVED

At a session of said Court, in the city of Ann Arbor, County of Washtenaw, State of Michigan on April 28, 1997.

PRESENT HON: _____
Circuit Court Judge

The Court having reviewed the submissions and arguments of the parties, and otherwise being fully advised in the premises;

IT IS HEREBY ORDERED THAT this Plaintiffs' Motion to Deem Physician Patient Waived is hereby denied, and Plaintiffs may not compel the disclosure of any further information regarding the medical treatment of Defendant, Karl Otto Mueller, by Defendant, William C. Bucknam, M.D. This Order does not apply to information that has already been disclosed and remains unprivileged, including documents submitted to the Michigan Department of State, answers to interrogatories, and answers to deposition questions.

s/MELINDA MORRIS
Hon. Circuit Court Judge

This Order was prepared by Plaintiff's Counsel.

APPENDIX D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASTENAW

SHERYL KNIGHT and STEVE KNIGHT,

Plaintiffs,

Case No. 96-2725-NI

v

HON. MELINDA MORRIS

KARL OTTO MUELLER, and
WILLIAM C. BUCKNAM, M.D.,
jointly and severally,

Defendants.

CHARLES N. SIMKINS (P 24990)
ROBERT B. JUNE (P 51149)
SIMKINS & SIMKINS, P.C.
Attorneys for Plaintiffs
200 N. Center Street
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1700 First Federal Building
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(313) 237-5658

JOHN PATRICK O'LEARY (P 18464)
KEVIN P. HANBURY (P 39468)
O'LEARY, O'LEARY, JACOBS, MATTSON,
PERRY & MASON
Attorneys for Defendant, William C. Bucknam, M.D.
26777 Central Park Boulevard, Suite 275
Southfield, Michigan 48076-4165

(248) 799-8260

ORDER GRANTING DEPOSITION OF DEFENDANT, WILLIAM C. BUCKNAM, M.D., AND STRIKING DAN GUYER, M.D., AS AN EXPERT WITNESS

At a session of said Court, in the city of Ann Arbor, County of Washtenaw, State of Michigan on Oct 24 1997.

Present: Melinda Morris
Hon. Circuit Court Judge

This matter having come on for hearing before this Court on October 15, 1997, the Court having reviewed the written submissions and arguments, and otherwise being fully advised in the premises;

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion to Compel the Deposition of Defendant, William C. Bucknam, M.D., is granted with the understanding that:

   A. Plaintiffs shall not ask Defendant, William C. Bucknam, M.D. any of the questions that were asked at his deposition on January 20, 1997; and

   B. This Court's Order Denying Plaintiffs' Motion to Deem Physician-Patient Privilege Waived, entered on April 28, 1997, shall be enforced and honored by all counsel during the deposition of Defendant, William C. Bucknam, M.D.

2. The Court hereby strikes Dan Guyer, M.D., as an expert witness in this case, and Dr. Guyer shall not testify at trial of this action.

3. In the event that the physician-patient privilege is waived or this Honorable Court's ruling regarding same is reversed, thus making Mr. Mueller's medical records

available and testimony regarding the nature of his psychiatric relationship with Dr. Bucknam available, Defendant may petition the Court to reinstate Dr. Guyer as an expert witness.

4. The Court reserves any further ruling on the Affidavit of Dan Guyer, M.D. until such time as Defendant Dr. Bucknam's Motion for Summary Disposition is heard.

s/MELINDA MORRIS
Hon. Circuit Court Judge

This Order was prepared by counsel for Plaintiffs, Sheryl Knight and Steve Knight.

s/Robert B. June (P 51149) 10/21/97
Attorneys for Plaintiffs Date

Approved as to form:

s/Jennifer Andreou (P 38973 10/21/97
Attorney for Defendant, Date
William C. Bucknam, M.D.

s/Dennis Killeen (P 29773) 10/23/97
Attorney for Defendant,0 Date
Karl Otto Mueller

APPENDIX E

Court of Appeals, State of Michigan

ORDER

Harold Hood
Presiding Judge

Sheryl Knight v Karl Otto Mueller

Michael R. Smolenski

Docket No. 212478

Michael J. Talbot

LC No. 96-002725 NI

Judges

The Court orders that the motion for rehearing is hereby DENIED.

s/Harold Hood
Presiding Judge

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

July 21, 2000 s/_____
Date Chief Clerk

APPENDIX F

Order
Entered: February 26, 2001

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

117419

SHERYL KNIGHT and STEVE KNIGHT,
Plaintiffs-Appellants,

V

SC: 117419
COA: 212478
KARL OTTO MUELLER, Washtenaw CC: 96-002725-NI
Defendant,

and

WILLIAM C. BUCKNAM, M.D.,

Defendant-Appellee.

On order of the Court, the application for leave to appeal from the April 28, 2000 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

e0220
I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.
February 26, 2001 s/Corbin R. Davis Clerk

APPENDIX G

Order
Entered: May 29, 2001

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

117419(52)

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SHERYL KNIGHT and STEVE KNIGHT,

Plaintiffs-Appellants,

V SC: 117419
COA: 212478

KARL OTTO MUELLER, Washtenaw CC: 96-002725-NI

Defendant,

and

WILLIAM C. BUCKNAM, M.D.,

Defendant-Appellee.

On order of the Court, the motion for reconsideration of this Court's order of February 26, 2001, is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

b0522
I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 29, 2001 s/Corbin R. Davis Clerk

APPENDIX H

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

SHERYL KNIGHT and STEVE KNIGHT,

C. A. #96-2725-NI

HON.:

Plaintiffs,

v.

KARL OTTO MUELLER,
Defendant.

_____/

BARRY P. WALDMAN P21902
BRIAN A. McKENNA P46671
Attorneys for Plaintiffs
1000 Farmer Street
Detroit, MI 48226
313 965-3464 (fax 965-4315)

_____/

[EXCERPTS FROM]
DEFENDANT'S ANSWERS TO
PLAINTIFFS' INTERROGATORIES TO DEFENDANT,
DATED FEBRUARY 12, 1996

4. At the time of the alleged occurrence, were you suffering from any medical condition, injury, disease, or illness? If so, please list each such condition, injury, disease or illness which defendant was suffering from on the date of the alleged occurrence, and the name and address of the physician(s) treating same.

ANSWER:

I am a manic depressive;
My treating physician: William C. Buckman, M.D.
5340 Plymouth Rd., Suite 207
Ann Arbor, MI 48105

10. Please state whether you took or ingested any drug, narcotic, sedative, tranquilizer or any other form of medication or medical preparation, whether prescribed or not, within the 24 hours immediately preceding the alleged occurrence. If so, please state:

a. Nature of substance taken or ingested;
b. When and where taken or ingested;
c. Whether procured by prescription;
d. Quantities taken or ingested;
e. Time period over which taken or ingested.

ANSWER:

a. One a day vitamin tablet, Synthroid, Tegratol
b. At home and at work
c. Synthroid and Tegratol are prescription medications
d. 9-10 hour time period

13. List the names and addresses of all persons known to you or your representative or attorney, who have any knowledge or claim to have any knowledge or relevant information, facts or circumstances relative to the instant cause of action.

ANSWER:

*** William C. Buckman, M.D., 5340 Plymouth Rd., Ste. 207, Ann Arbor, MI 48105;

***

s/Karl Otto Mueller

APPENDIX I

[EXCERPT]
UNITED STATES OF AMERICA
The State of Michigan
DEPARTMENT OF STATE
TO ALL TO WHOM THESE PRESENTS SHALL COME:

T. Candice S. Miller, Secretary of State of the State of Michigan and Custodian of the Great Seal thereof, Do Hereby Certify that THE ANNEXED COPIES OF DRIVING RECORD, ORDER OF ACTION AND DOCTOR'S STATEMENT IN THE NAME OF KARL OTTO MUELLER, BIRTHDATE 01/03/1941, ARE TRUE COPIES. *END OF CERTIFICATION*

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State in the Capital City of Lansing, this SIXTH day of MARCH A.D. 1997

s/Candice S. Miller
Secretary of State

[new page]

MICHIGAN DEPARTMENT OF STATE
LANSING, MI 48918-1601

PHYSICIAN'S STATEMENT OF EXAMINATION

INSTRUCTIONS FOR DRIVER/APPLICANT:

The Department of State has received information that you may be afflicted with a physical or mental condition that may affect your ability to safely operate a motor vehicle. Please have your physician complete this form. The completed form must be returned to the following address. It cannot be processed at a local licensing bureau.

INKSTER-WAYNE SAFETY CENTER
DRIVER IMPROVEMENT ANALYST
27165 CHERRY HILL ROAD

INKSTER MI 48141-1234

PLEASE NOTE: The Department of State may withhold licensing pending receipt and evaluation of this form. Unsigned or incomplete forms will be returned for completion.

RELEASE OF INFORMATION

Name Driver's License No.

I, (Please Print or type) Karl Otto Mueller M 460 461 668010 hereby authorize and request that information regarding my physical and psychological condition be released to the Michigan Department of State.

s/Karl Mueller	11/9/95
Signature	DATED
13 Byfield	1-3-41
Street	DATE OF BIRTH
Dearborn MI 48120	(313) 663-9011
City State Zip	TELE. NO.

Friday, Nov. 17, 1995 1:00pm

INSTRUCTIONS FOR PHYSICIAN:

The Department of State asks your assistance in determining the physical and/or mental condition of your patient. Your professional opinion, the answers to these questions and any other pertinent information will help the Department assess this individual's ability to safely operate a motor vehicle. Confidential information may be mailed directly to the Department at the address shown in the instructions to Driver above.

Please type or print your answers and attach EG or EKG evaluations if applicable.
You need only fill out the section(s) indicated or pertinent to this person.

(x) Neurological or Neuromuscular Diseases – page 2 ___

(x) Other Medical Disorders – page 3 & 4 _____
(x) Drugs and Alcohol – page 4 _____
(x) Psychological Evaluation – page 5 _____
(x) Comments – page 6 _____

Reason for Request

Certification by physician's signature is required on page 6.

FOR DRIVER IMPROVEMENT USE ONLY
(x) Favorable ( ) set up ___( ) Refer for reexamination
( ) Restriction _____( ) Refer to Health Consultant
_____( ) Need additional information
( ) Must Pass _____test ( ) Medical ( ) Vision
( ) Unfavorable

Reviewed By s/T. Duncan Date 11/17/95

[new page]

[*Italics signify handwritten remarks of Dr. Bucknam]

PSYCHOLOGICAL EVALUATION

1. Diagnosis of psychiatric illness: *Bipolar Affective Disorder, Manic, in remission*

Which of the following symptoms are present? (Please Check) ***NONE NOW***

( ) Anxiety	( ) Paranoid ideation
( ) Hallucinations	( ) Depression
( ) Suicidal Impulses	( ) Impairment of judgment
( ) Euphoria	( ) Homicidal impulses
( ) Poor Memory	( ) Poorly controlled anger
( ) Insomnia	( ) Mental retardation
( ) Bizarre behavior	( ) Delusions
( ) Senility or Dementia	( ) Other _____

Please amplify on any of the above or other disorders. Include approximate duration of illness, severity of illness, treatment and prognosis: *Approximately 25 yr. Hx of above diagnosis, manifested by manic episodes with*

frequency of every 2 years, on average. During a manic episode he has impaired judgement, delusions and bizarre behavior. Episodes require hospitalization for 1–2 weeks.

2. Current medication and dosage: *Tegretol 800 mg/d, Depakote 500 mg/d & lithium carbonate 600 mg/d.*

3. Any adverse or other reactions to medication, treatment or therapy? Please explain: *Hx of neuroleptic malignant syndrome.*

   a. Does medication make patient drowsy? No X Yes _
   b. Is patient capable of safely operating a motor vehicle while taking the above prescribed medication(s)? No _____ Yes X Please explain:

4. Has patient ever been hospitalized for the disorder? No _____ Yes X Please indicate when, where and for how long:: *Approximately every 2 years x 1-2 weeks, usually at St Joseph Mercy Hosp in Ann Arbor and most recently from Oct 3 – Oct 16, 1995*

5. Frequency of therapy: *Outpatient every 6 weeks for medication review only*

6. Do you believe this patient is capable of operating a motor vehicle? No _____ Yes X Please explain: ___

7. Do you recommend any driving restrictions? No X Yes____ Please explain: ____

8. Does the patient follow your medical and psychiatric recommendations? No_____ Yes X Please explain: _____

[new page]

COMMENTS

1. How long has this patient been under your treatment? *Since 1/27/87* Frequency of visits: *every 6 weeks*

2. Was patient referred to you by another doctor? No ____ Yes X If yes, please indicate name and address of

referring doctor: *Former psychiatrist, Dr. Babcock, moved away.*

3. Have you referred the patient to another medical specialist for diagnosis or treatment? No X Yes ____ If yes, please indicate name and address of doctor to whom referred and results of consultation:_____

4. Has patient followed your medical recommendation? No ___ Yes X

   a. Does the patient keep appointments? No__ Yes X
   b. Does the patient take medication as prescribed? No__ Yes X

5. Has the patient ever had occupational or physical therapy for the condition in question? No X Yes ____ If yes, what date(s), where and for how long? ____

6. Do you recommend that the Department request a statement of your patient's Psychological Condition? No X Yes____ Visual Acuity? No X Yes ____

7. Do you recommend any driving restrictions? No X Yes___ If yes, please specify: ____

8. Do you recommend the Dept. conduct a periodic driving evaluation? No X Yes ___ How often: ____

9. Should the Dept. require periodic medical evaluation to monitor changes which may affect driving? No X Yes ___ How often: ____

10. Please include any additional information you feel will help in assessing your patient's ability to safely operate a motor vehicle: *Between manic episodes, which are brief and require hospitalization, Mr. Mueller is asymptomatic*

Certification:

I certify that the statements contained in this statement of examination are true to the best of my knowledge and belief.

DOCTOR'S SIGNATURE *s/William C. Bucknam MD* DATED *Nov 11, 1995*

Name (Print or Type) *William C. Bucknam*
Address *5340 Plymouth Rd #207 Ann Arbor MI 48105*
Professional License No. *043167* Telephone No. *(313) 747-7114*
Type of Practice or Medical Specialty *Psychiatry*

APPENDIX J

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

SHERYL KNIGHT and STEVE KNIGHT,	Civil Action No. #96-2725-NI
Plaintiffs, vs KARL OTTO MUELLER, Defendant.	Honorable Melinda Morris

[EXCERPTS FROM]

The Discovery Deposition of KARL OTTO MUELLER – VOLUME 1, the Defendant herein, taken pursuant to Notice of Taking Deposition, before Catherine L. Albin, CSR-5980, a Notary Public within and for the County of Wayne, State of Michigan, at 200 North Center Street, Northville, Michigan, on Friday, October 11, 1996, commencing about 9:45 o'clock in the forenoon.

APPEARANCES:

ROBERT B. JUNE, ESQ P51149
Simkins & Simkins, P.C.
200 North Center Street
Northville, Michigan 48167-1416

For the Plaintiffs.

JOSEPH K. BACHRACH, ESQ. P25498
Becker, Lanctot, McCutcheon,
Schoolmaster, Taylor & Hom
1700 First Federal Building
Detroit, Michigan 48226-1963

For the Defendant.

Northville, Michigan
Friday, October 11, 1996

About 9:45 o'clock, a.m.

KARL OTTO MUELLER,

the Defendant herein, having been first duly sworn by the Notary Public, testified as follows:

...

[pp. 25-27]

[Note: Dr. Bucknam's name was incorrectly transcribed in the record as Dr. Buckman. His name has been corrected here.]

Q: I'm wondering in relation to after the accident happened about how long was it before the police arrived.

A: Perhaps ten to fifteen minutes.

Q: You say this Dr. Bucknam arrived after the accident as well; is that right?

A: Yes.

Q: What's Dr. Bucknam's first name?

A: William S. Bucknam.

Q: Did Dr. Bucknam arrive before or after the police?

A: I'm not sure.

Q: Do you know how Dr. Bucknam knew to go to the accident scene?

A: I had met Dr. Bucknam at his office on Plymouth Road, and we were going to go over to St. Joseph's Hospital.

Q: So was he following you?

A: I believe I was following him.

Q: Do you know – did he explain how he found you, how he learned that you had been in an accident?

A: No.

Q: So he was on his way to St. Joseph's Hospital, and you were following him; is that right?

A: Yes.

Q: And then you had this accident. And so he was continuing on his way to St. Joseph's Hospital and you were no longer following him; is that right?

A: I don't know.

Q: Do you know if he actually saw the accident?

A: I don't know.

...

[pg. 28]

Q: Were you having a manic episode at the time of the accident?

A: I think I was in the beginning of having a manic episode.

...

[pp. 31-34]

Q: According to your interrogatory, this is number thirty-two, it states that at the time of the accident, "I was coming from 5340 Plymouth Road in Ann Arbor and going to St. Joseph's Hospital"; is that correct?

A: Yes.

Q: Is 5340 Plymouth Road the office of Dr. Bucknam?

A: Yes, it is.

Q: Was anybody else with you while you were going from Dr. Bucknam's office to St. Joe's?

A: No.

Q: Was anybody else with Dr. Bucknam while he was going to St. Joe's, to the best of your knowledge?

A: To the best of my knowledge, no.

Q: Again, he was driving first and you were driving second; is that right?

A: Yes. I believe so.

Q: You mentioned that you were getting ready to take a turn when the accident happened; is that right?

A: I think so. Yes.

Q: And I want to show you your answer to Interrogatory No. 33.

A: Yes.

Q: Actually, I'm sorry. Number thirty-four.

A: Okay.

Q: It says, "I was driving on Dixboro Road going to St. Joseph's Mercy Hospital. I slowed to turn into the parking lot. I saw an oncoming car in the distance that I assumed was not driving above the speed limit. I looked over into the parking lot to see that my path was clear. I turned and plaintiff's and my car collided." Is that correct?

A: Yes.

Q: Is that an accurate description of how you recall the accident?

A: Yes.

Q: What parking lot is it that you were turning into?

A: I'm not sure.

Q: Let me explain why I'm confused. In answer to number thirty-two, you say you're going from Dr. Bucknam's office, basically, to St. Joe's; is that right?

A: Yes.

Q: And you were following him?

A: Yes.

Q: Did he turn into the parking lot?

A: I think so.

Q: There's a parking lot off of Dixboro Road by the Huron River?

A: I don't know.

Q: It is on Dixboro Road between the Huron River and Huron River Drive where the accident occurred; is that correct?

A: Yes.

Q: Is that where you were going to the parking lot there?

A: I was going to St. Joseph's Hospital.

Q: Why would you be turning into a parking lot between Huron River and Huron River Drive?

A: I don't know.

...

[pp. 80-81]

Q: You had taken your medication on the day of this accident?

A: Yes.

Q: Nevertheless, you had a manic episode?

A: Yes.

Q: So you did have the symptoms despite taking the medication?

A: Say that again.

Q: Did you have the symptoms of your condition despite that you had taken your medication?

A: At that time, I was questioning whether or not I did, and that is why I called up Dr. Bucknam and had an appointment with him, and let him make that decision.

Q: So you were having questions about whether you were entering into a manic episode; is that right?

A: Yes.

Q: You went to see Dr. Bucknam for that?

A: Yes.

Q: It's in some relation to that that you were traveling to St. Joseph Hospital; is that correct?

A: Yes.

Q: And that's when this accident happened; is that right?

A: Yes.

Q: During the accident you were having a manic episode; right?

A: I don't know if I can say I was having a manic episode or I was at the beginning of a manic episode.

...

[pg. 85]

Q: When you're in a manic episode, do you know it?

A: I don't.

APPENDIX K

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

SHERYL KNIGHT and STEVE KNIGHT,	Civil Action No. #96-2725-NI
Plaintiffs,	Honorable Melinda Morris
vs	
KARL OTTO MUELLER, Defendant.	

The Discovery Deposition of WILLIAM C. BUCKNAM, M.D. – VOLUME 1, a Witness herein, taken pursuant to Notice of Taking Deposition, before Catherine L. Albin, CSR-5980, RPR, a Notary Public within and for the County of Wayne, State of Michigan, acting in the County of Oakland, at 26777 Central Park Boulevard, Suite 275, Southfield, Michigan, on Monday, January 20, 1997, commencing at 9:13 o'clock in the forenoon.

APPEARANCES:

ROBERT B. JUNE, ESQ P51149
Simkins & Simkins, P.C.
200 N. Center Street
Northville, Michigan 48167-1416

For the Plaintiffs.

DENNIS M. KILLEEN, ESQ. P29773
Becker, Lanctot, McCutcheon,
Schoolmaster, Taylor & Hom
1700 First Federal Building
Detroit, Michigan 48226

For the Defendant.

JOHN PATRICK O'LEARY, ESQ. P18464
O'Leary, O'Leary, Jacobs,

Mattson & Perry, P.C.
26777 Central Park Boulevard, Suite 275
Southfield, Michigan 48076

For William G. Bucknam, M.D.

Southfield, Michigan
Monday, January 20, 1997
About 9:13 o'clock, a.m.

WILLIAM C. BUCKNAM, M.D., a Witness herein, having been first duly sworn by the Notary Public, testified as follows:

[EXCERPTS]

...

[pp. 7-9]

BY MR. JUNE

Q: Dr. Bucknam, I understand from talking with you in order to set up this deposition that you didn't actually see the collision that occurred, but that you were driving by and stopped as a good Samaritan; is that correct?

A: That is correct.

Q: Okay. Before I get on with that, could you just give us your full name, please?

A: William Carlin, C-a-r-l-i-n, Bucknam, B-u-c-k-n-a-m.

Q: You are a medical doctor?

A: Yes.

Q: Where is your professional address?

A: 5340 Plymouth Road, Number 207, Ann Arbor.

Q: As I was saying, you did not actually see the collision but were driving by and stopped as a good Samaritan; is that correct?

A: That's correct.

Q: Could you just take your time and tell me as best as you recall what you saw when you came upon the accident scene?

A: I saw Karl Mueller's vehicle in the lane of oncoming traffic, where the head-on collision had just occurred.

Q: Where was this?

A: Immediately south of the Dixboro Dam bridge.

Q: I want to show you a diagram that's included with what was Exhibit 2 of Karl Mueller's deposition. It's a diagram from the police report, and it shows vehicles on what appears to be the Dixboro Road Dam bridge. Does that appear to be approximately where the cars were when you saw them?

A: Yes.

Q: So they were actually on the bridge?

A: On the bridge then.

Q: Can you tell me, looking at one and two, the vehicles identified as one and two in this drawing, which one was Mr. Mueller's?

A: One.

Q: Was his car in the wrong lane of the road over the bridge?

A: Yes, it was.

Q: And they had had a head-on collision?

A: Yes.

...

[pg. 13]

Q: Did you talk with anyone else at the scene of the accident?

A: I spoke with a police officer.

...

[pp. 13-14]

Q: Can you describe the driver of the other vehicle besides Mr. Mueller?

A: No, I can't.

Q: Do you remember anything about that person?

A: No, I don't.

Q: Do you know if it was a man or a woman?

A: Only after the fact.

Q: What do you mean by that?

A: That the name Sheryl, I believe, is a woman's name, so I presume that the driver was a woman.

Q: Did you approach Ms. Knight at the accident at all?

A: No, I did not.

...

[pp. 14-15]

Q: You didn't make any observations one way or the other regarding whether Ms. Knight was injured?

A: No, I did not.

Q: So she could have been injured, and you don't know it -

A: That's correct.

...

[pp. 18-19]

Q: Okay. Had you observed Mr. Mueller's driving at any time that day prior to this occurrence?

A: Yes, I had.

Q: And when was that?

A: I observed his driving from my rearview mirror.

Q: At what time?

A: Probably about six-forty p.m.

Q: Where were you traveling?

A: I was traveling on Dixboro.

Q: From Plymouth Road?

A: From Plymouth Road.

Q: To Huron River Drive?

A: To Huron River Drive.

Q: Did you perceive him in your rearview mirror as you proceeded down Huron River Drive?

A: Yes, I did. I believe I did.

Q: Did you perceive him in your mirror as you turned into Saint Joe's Hospital?

A: Yes.

Q: At that point, did he turn around and take off?

A: I didn't see him do so.

...

[pp. 19-20]

Q: Well, you lost track of him?

A: Yes.

Q: Down at Saint Joe's Hospital?

A: Um-hmm.

Q: About how far is that from the bridge? Do you know?

A: Slightly over a half a mile.

Q: Which parking lot were you going in?

A: Emergency room.

MR. KILLEEN: I'm sorry. What did you say?

THE WITNESS: Emergency room.

BY MR. JUNE

Q: So as you're proceeding down Huron River Drive, you come to a point where it curves over towards Clark, and there are two entrances to Saint Joe's; is that right? The first one is a regular entrance, the second one's the emergency entrance; is that right?

A: That's right.

Q: And you were going in the emergency entrance?

A: Yes.

...

[pp. 20-21]

Q: When you realized that Mr. Mueller was no longer with you, did you turn around to go look for him?

A: I realized that he was no longer there about twenty minutes after I was waiting in the emergency room area. I went back into the parking lot to see if he was still parked and waiting in his car, perhaps, for me, was my thought at the time.

Q: And you didn't see him?

A: I did not see him in the parking lot at that time.

Q: So then you proceeded to go back toward your office?

A: In the direction of my office.

Q: Were you going home?

A: I was going home.

Q: And that's when you came upon the accident?

A: That is when I came upon the accident.

...

[pg. 24]

Q: Did you drive Mr. Mueller away from the accident scene?

A: Yes, I did.

Q: In your vehicle?

A: In my vehicle.

...

[pg. 26]

Q: Dr. Bucknam, did you tell the police officer that Mr. Mueller was having a manic episode?

A: Yes, I did.

...

[pg. 27]

Q: Mr. Mueller has testified that he met you at your office prior to going over towards Saint Joe's; is that correct?

MR. O'LEARY: You can respond.

A: That is correct.

...

[pp. 29-30]

Q: Why didn't you drive Mr. Mueller over to Saint Joe's from your office?

MR. O'LEARY: Objection. And you're not obliged to respond to that, for sure. That's not an area of inquiry that is in any way material or germane to these proceedings.

APPENDIX L

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

SHERYL KNIGHT and STEVE KNIGHT,

Case No.: 96-2725-NI
Hon. Melinda Morris

Plaintiffs,
vs
KARL OTTO MUELLER, and
WILLIAM C. BUCKNAM, M.D.,
jointly and severally,

Defendant(s).

DEPONENT: WILLIAM C. BUCKNAM, M.D.

DATE: Wednesday, January 21, 1998

TIME: 10:30 a.m.

LOCATION: O'Leary, O'Leary, Jacobs, Mattson, Perry & Mason
26777 Central Park Boulevard, Suite 275
Southfield, Michigan 48076

REPORTER: Mary Jo Griffin, RPR/CSR-6279

APPEARANCES:

SIMKINS & SIMKINS, P.C.
By: Mr. Robert B. June
200 North Center Street
Northville, Michigan 48167
(248) 349-6030

Appearing on behalf of Plaintiff(s).

BECKER, LANCTOT, McCUTCHEON, SCHOOLMASTER, TAYLOR & HOM
By: Mr. Dennis M. Killeen
150 West Jefferson, Suite 1300
Detroit, Michigan 48226

(313) 237-5658

Appearing on behalf of Defendant(s) Karl Otto Mueller.

O'LEARY, O'LEARY, JACOBS,
MATTSON, PERRY & MASON
By: Mr. John Patrick O'Leary
26777 Central Park Boulevard, Suite 275
Southfield, Michigan 48076
(248) 799-8260

Appearing on behalf of Defendant(s) William C. Bucknam, M.D.

...

[pg. 4]

Southfield, Michigan
Monday, January 21, 1998
10:30 a.m.

MR. JUNE: Let the record reflect that this is the deposition of William C. Bucknam, M.D., being taken in this matter pursuant to Notice for all purposes allowed under the Michigan Court Rules and Michigan Rules of Evidence.

WILLIAM C. BUCKNAM, after having been first duly sworn, was examined and testified as follows:

[EXCERPTS]

...

[pg. 17]

BY MR. JUNE

Q: If a person is experiencing symptoms of a manic episode, at that time is their disorder – at that time is their disorder in remission?

A: No.

...

[pg. 18]

Q: (By Mr. June) Are there any reference books that you utilize in your diagnosis and treatment of bipolar disorder?

A: Yes.

Q: What textbooks?

A: DSM-IV.

Q: DSM, is that called the Diagnostic and Statistical Manual of Mental Disorders?

A: Yes.

Q: Are there any others?

A: No.

APPENDIX M

[EXCERPTS FROM]

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS

FOURTH EDITION

DSM-IV™

PUBLISHED BY THE
AMERICAN PSYCHIATRIC ASSOCIATION
WASHINGTON, DC

...

Manic Episode

Episode Features

A Manic Episode is defined by a distinct period during which there is an abnormally and persistently elevated, expansive, or irritable mood. This period of abnormal mood must last at least 1 week (or less if hospitalization is required) (Criterion A). The mood disturbance must be accompanied by at least three additional systems from a list that includes inflated self-esteem or grandiosity, decreased need for sleep, pressure of speech, flight of ideas, distractibility, increased involvement in pleasurable activities or psyched motor agitation, and excessive involvement in pleasurable activities with a high potential for painful consequences. If the mood is irritable (rather than elevated or expansive), at least four of the above symptoms must be present (Criterion B). The symptoms do not meet criteria for a Mixed Episode, which is characterized by the symptoms of both a Manic Episode and a Major Depressive Episode occurring nearly every day for at least a

1-week period (Criterion C). The disturbance must be sufficiently severe to cause marked impairment in social or occupational functioning or to require hospitalization, or it is characterized by the presence of psychotic features (Criterion D). The episode must not be due to the direct physiological effects of a drug of abuse, a medication or other somatic treatments for depression (e.g., electroconvulsive therapy or light therapy) or toxin exposure. The episode must also not be due to the direct physiological effects of a general medical condition (e.g., multiple sclerosis, brain tumor) (Criterion E).

[...]

Inflated self-esteem is typically present, ranging from uncritical self-confidence to marked grandiosity, and may reach delusional proportions (Criterion B1).

[...]

Expansiveness, unwarranted optimism, grandiosity, and poor judgment often lead to an imprudent involvement in pleasurable activities such as buying sprees, reckless driving, foolish business investments, and sexual behavior unusual for the person, even though these activities are likely to have painful consequences (Criterion B7). The individual may purchase many unneeded items (e.g., 20 pairs of shoes, expensive antiques) without the money to pay for them. Unusual sexual behavior may include infidelity or indiscriminate sexual encounters with strangers.

The impairment resulting from the disturbance must be severe enough to cause marked impairment in functioning or to require hospitalization to protect the individual from the negative consequences or actions that result from poor judgment (e.g., financial losses, illegal activities, loss of employment, assaultive behavior). By definition, the presence of psychotic features during a Manic Episode constitutes marked impairment of functioning (Criterion D).

[...]

Associated Features and Disorders

Associated descriptive features and mental disorders. Individuals with a Manic Episode frequently do not recognize that they are ill and resist efforts to be treated.

[...]

Criteria for Manic Episode

A. A distinct period of abnormally and persistently elevated, expansive, or irritable mood, lasting at least 1 week (or any duration if hospitalization is necessary).

B. During the period of mood disturbance, three (or more) of the following symptoms have persisted (four if the mood is only irritable) and have been present to a significant degree:

(1) inflated self-esteem or grandiosity
(2) decreased need for sleep (e.g., feels rested after only 3 hours of sleep)
(3) more talkative than usual or pressure to keep talking
(4) flight of ideas or subjective experience that thoughts are racing
(5) distractibility (i.e., attention too easily drawn to unimportant or irrelevant external stimuli)
(6) increase in goal-directed activity (either socially, at work or school, or sexually) or psychomotor agitation
(7) excessive involvement in pleasurable activities that have a high potential for painful consequences (e.g., engaging in unrestrained buying sprees, sexual indiscretions, or foolish business investments)

C. The symptoms do not meet criteria for a Mixed Episode (see p. 335).

D. The mood disturbance is sufficiently severe to cause marked impairment in occupational functioning or in usual social activities or relationships with others, or to necessitate hospitalization to prevent harm to self or others, or there are psychotic features.

E. The symptoms are not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication, or other treatment) or a general medical condition (e.g., hyperthyroidism).

Note: Manic-like episodes that are clearly caused by somatic antidepressant treatment (e.g., medication, electroconvulsive therapy, light therapy) should not count toward a diagnosis of Bipolar I Disorder

APPENDIX N

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASTENAW

SHERYL KNIGHT and STEVE KNIGHT,

Plaintiffs,

Case No. 96-2725-NI

v

HON. MELINDA MORRIS

KARL OTTO MUELLER, and
WILLIAM C. BUCKNAM, M.D.,
jointly and severally,

Defendants.

CHARLES N. SIMKINS (P 24990)
ROBERT B. JUNE (P 51149)
SIMKINS & SIMKINS, P.C.
Attorneys for Plaintiffs
200 N. Center Street
Northville, Michigan 48167-1416
(248) 349-6030

DENNIS M. KILLEEN (P 29773)
BECKER, LANCTOT, McCUTCHEON,
SCHOOLMASTER, TAYLOR & HOM
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Detroit, Michigan 48226
(313) 237-5658

JOHN PATRICK O'LEARY (P 18464)
KEVIN P. HANBURY (P 39468)
O'LEARY, O'LEARY, JACOBS, MATTSON,
PERRY & MASON
Attorneys for Defendant, William C. Bucknam, M.D.
26777 Central Park Boulevard, Suite 275
Southfield, Michigan 48076-4165

(248) 799-8260

AFFIDAVIT OF GERALD A. SHIENER, M.D.

County of Washtenaw }
}ss
State of Michigan }

Gerald A. Shiener, M.D., first being duly sworn, deposes and says:

1. I am Gerald A. Shiener, M.D., a diplomat of the American Board of Psychiatry and Neurology with added qualifications in addiction psychiatry and forensic psychiatry.

2. I have reviewed several documents pertaining to this matter, including Plaintiffs' Second Amended Complaint, the transcript of the deposition of William C. Bucknam, M.D.; the transcript of the deposition of Karl Otto Mueller; the police report, and a Physician's Statement of Examination filed with the Michigan Department of State.

3. I have knowledge of the facts and opinions contained herein, I am competent and qualified to testify to those facts and opinions, and I will do so if called as a witness in this action.

4. Based on my review of the above-mentioned documents:

   A. On October 3, 1995, Karl Otto Mueller submitted himself to the care of his psychiatrist, William C. Bucknam, M.D., while Mr. Mueller was experiencing the symptoms of a manic episode;

B. Dr. Bucknam determined that Mr. Mueller was in fact experiencing a manic episode;

C. Dr. Bucknam had a lengthy history of treating Mr. Mueller for manic episode, and Dr. Bucknam knew that Mr. Mueller has impaired judgment, delusions, and bizarre behavior during a manic episode;

D. A decision was made to admit Mr. Mueller for emergency psychiatric treatment at St. Joseph Mercy Hospital in Ann Arbor, Michigan;

E. Rather than arranging transportation for Mr. Mueller from Dr. Bucknam's office to St. Joseph Mercy Hospital, it was arranged for Mr. Mueller to drive his own vehicle and follow Dr. Bucknam to the emergency room at the hospital;

F. During this journey, Mr. Mueller crossed the center line of Dixboro Road and collided head-on with a vehicle driven by Sheryl Knight.

5. It is my opinion that Dr. Bucknam was negligent in not arranging transportation for this patient, but rather allowing the patient to drive to the hospital in his own vehicle, and this negligence resulted in the accident in which Sheryl Knight was injured.

Further Affiant sayeth not.

s/Gerald A. Shiener, M.D.

Subscribed and sworn to before

Me on October 21, 1997
s/Sandy M. Zander
Notary Public, Oakland County, MI
My Commission Expires Sept. 29, 2001
Acting in Wayne

APPENDIX O

CURRICULUM VITAE

Gerald A. Shiener, M.D.

Address: Office: 251 Merrill
Birmingham, Michigan 48009
(Private Practice)

Home: 6156 Pickwood Drive
West Bloomfield, Michigan 48322

Birthdate: July 19, 1949

Citizenship: U.S.A.

Married: Karen Rosen
November 27, 1974

Children: Loren Renee
Born February 6, 1986

David Samuel
Born September 12, 1987

Education:

1967-71 Wayne State University, Monteith College
Wayne State University, College of Liberal Arts
Research Assistant in Psychology for Gerald Cook, Ph.D., Northville State Hospital and Lafayette Clinic
Research Assistant in Psychology for Gerald Rosenbaum, Ph.D., Lafayette Clinic
B. A. in Psychology

1971-75 Michigan State University College of Human Medicine
Research Assistant in Psychophysiology for Norman Kagan, Ph.D.
Student Representative to Michigan State Medical Society
Summer Research Fellow, National Institute Mental

Health
Vice-President, Local Chapter of the Student American Medical Association
Doctor of Medicine Degree granted by Michigan State University

Training:

1975-76	Resident in Psychiatry, Sinai Hospital of Detroit 9 months – Inpatient service 2 months – Neurology service 1 month – Emergency psychiatry service
1976-77	Resident in Psychiatry, Sinai Hospital of Detroit 3 months – Emergency psychiatry service 3 months – Day Hospital service --Problems of Daily Living Clinic 5 months – Adolescent psychiatry, Lafayette Clinic
1977-78	3 months – Honorary Clinical Assistant, London Hospital Medical College, for Professor Desmond Pond, M.D., D.P.M., F.R.C. Psych. Resident in Psychiatry, Sinai Hospital of Detroit 10 months – Outpatient service 10 months – Psychogeriatrics consultant to Jewish Home for the Aged, Detroit, Michigan 10 months – Consultation service for Physical Medicine and Rehabilitation Department, Sinai Hospital of Detroit
1978	Residency in Psychiatry completed, Sinai Hospital of Detroit

Faculty Appointments:

1978-	Clinical Instructor, Department of

Psychiatry, Michigan State University, College of Human Medicine

1978- Assistant Professor, Department of Psychiatry, Wayne State University, School of Medicine

1988- Assistant Professor, Department of Anesthesiology, Wayne State University, School of Medicine

Hospital Appointments and Positions: Current

1978- Attending Staff, Sinai Hospital of Detroit

1978- Attending Staff, Mount Carmel Mercy Hospital

1980- Attending Staff, William Beaumont Hospital, Royal Oak

1982-90 Attending Staff, Kingswood Hospital, Ferndale, Michigan

1982- Psychiatric Consultant, Jewish Home for the Aged

1983- Chief, Consultation-Liasion Psychiatry, Sinai Hospital of Detroit
Psychiatric Consultant, Department of Anesthesiology Pain Clinic, Sinai Hospital of Detroit

1986- Psychiatric Consultant, City of Detroit Department of Police

Director, Obsessional Disorders Treatment Unit (Anafranil Study)

1989-91 Attending Staff, Margaret Montgomery Hospital

1990- Psychiatric Consultant, State of Michigan Attorney Discipline Board

1990-92 Pontiac General Hospital, Pontiac, Michigan

1991-92	State of Michigan, Department of Mental Health, Psychotropic Drug Use Committee
1993	Sinai Hospital of Detroit, Dementia Research and Treatment Unit, Cognex Research Protocol
	Surveyor, Commission on Accreditation of Rehabilitation Facilities

Hospital Appointments: Past

1978-81	Chief, Crisis Intervention Service, Sinai Hospital of Detroit
1978-81	Chief, Crisis Intervention, Mt. Carmel Mercy Hospital
1981-82	Associate Chief, Day Hospital, Sinai Hospital of Detroit

Professional Organizations:

1979-	American Psychiatric Association
1979-	Michigan Psychiatric Society
1979-	Oakland County Medical Society
1979-80	Member, Michigan Psychiatric Society, Committee on Emergency Care
1976-77	Chairman, Michigan Psychiatric Society Committee on Residents
1986	American Academy of Psychosomatic Medicine
1989	American Society of Addiction Medicine

Licensure:

1976	State of Michigan
1977	United Kingdom
1979	State of California

Board Certification:

1980	Certified by the American Board of

Psychiatry and Neurology

1991 Certified by the American Society of Addiction Medicine

Honors and Awards:

1977-78 Chief Resident

1978-79 Harry E. August Award for outstanding performance as a resident

1984 Outstanding Faculty Member, Sinai Hospital of Detroit

Publication:

1976-77 Clinical Case Report "Pituitary Adenoma with Secondary Hypothyroidism Presenting as Manic Depressive Psychosis" abstracted in The Sinai Bulletin

1991 "Acute Psychoses"; "Anxiety Disorders" in The Clinical Practice of Emergency Medicine, Harwood-Nuss, Editor. J. B. Lippincott, New York 1990

"When the Patient Becomes Agitated: Diagnosis and Management of the Acutely Psychotic Medical Patient" Patient Care 25:14 Sept 1991

1993 "The Agitated Acutely Psychotic Patient" American College of Emergency Physicians Study Guide ACEP Press 1993

Presentations:

1985: "Management of Common Pain Syndromes" Michigan State Medical Society Winter Meeting

1986: "Evaluation of the Acute Psychiatric Patient"

"Management of Behavioral Emergencies" American College of Emergency Physicians Scientific Assembly – Atlanta, Ga.

1987: "Evaluation of the Acute Psychiatric Patient"
"Management of Behavioral Emergencies" American College of Emergency Physicians Annual Meeting – San Francisco, Ca.

1988: "Evaluation of Psycho-Behavioral Emergencies"
"Suicide – Risk Evaluation and Management"

"Evaluation of Altered Mental Status in the Emergency Room" American College of Emergency Physicians Annual Meeting – New Orleans, La.

1989: "Psychological Management of Malignant Pain" Michigan Cancer Foundation Winter Scientific Meeting

1989: "Evaluation and Treatment of Sexual Disorders" Michigan State Medical Society Winter Meeting

1990: "Pain Patient – Evaluation and Management" Grand Rounds, Detroit Psychiatric Institute

"Beyond a Shadow of a Doubt – Psychiatric Intervention in the Rehabilitation of the Traumatic Brain Injured Patient" William Beaumont Hospital Rehabilitation Conference

"Evaluation of Psycho-Behavioral Emergencies"
"Evaluation of Altered Mental Status in the Geriatric Patient"
American College of Emergency Physicians Annual Meeting – San Francisco, California

"Clinical Evaluation of the Suicidal Patient" Michigan State Medical Society – Winter Meeting

"Depression and Suicide in the Closed Head Injured Patient" Michigan Head Injury Alliance – Annual Meeting, Flint, Michigan

1991: "Psychiatry and The Law" State Bar of Michigan, Worker's Compensation Section Winter Meeting

"Evaluation of Psycho-Behavioral Emergencies" American College of Emergency Physicians Annual Meeting -- Boston, Massachusetts

"Management of Common Pain Syndromes" Grand Rounds, Department of Psychiatry University of Texas Southwestern, Dallas, Texas

"Chronic Pain" Dallas – Fort Worth Physical Medicine and Rehabilitation Society

1992: "Electroconvulsive Treatment in the Medically Ill Patient" Michigan Psychiatric Society – Winter Meeting

"Dual Diagnosis in the Traumatic Brain Injured Patient" New Medicos Second Annual Conference on Brain Trauma Rehabilitation

1993: "Diagnosis and Management of Chronic

Pain" Grand Rounds, Department of Neurology Henry Ford Hospital, Detroit, Michigan

"Anxiety Disorders – Post Traumatic Stress Disorders and Obsessive-Compulsive Disorder" Bournwood Hospital – Harvard University, Boston, Massachusetts

"Management of Chronic-Pain Patients" Grand Rounds, Sheppard Pratt Hospital Towsen, Maryland

APPENDIX P

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASTENAW

SHERYL KNIGHT and STEVE KNIGHT,

Plaintiffs,

v

Case No. 96-2725-NI
Honorable Melinda Morris

KARL OTTO MUELLER, and
WILLIAM C. BUCKNAM, M.D.,
Jointly and Severally,

Defendants.

CHARLES N. SIMKINS (P24990)
ROBERT B. JUNE (P 51149)
Attorneys for Plaintiffs
200 N. Center Street
Northville, MI 48167-1416
(810) 349-6030

DENNIS M. KILLEEN (P29773)
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1700 First Federal Building
Detroit, MI 48226
(313) 237-5658

JOHN PATRICK O'LEARY (P18464)
Attorney for Dr. Bucknam
26777 Central Park Boulevard
Suite 275
Southfield, MI 48076
(248) 799-8260

DEFENDANT DR. BUCKNAM'S MOTION FOR SUMMARY DISPOSITION

NOW COMES Defendant, William Bucknam, M.D., by his attorneys, O'LEARY, O'LEARY, JACOBS, MATTSON, PERRY & MASON, P.C., and for his Motion for Summary Disposition states unto this Honorable Court as follows:

1. This lawsuit was begun as an automobile negligence action as between the Plaintiffs and Defendant Mueller. (Exhibit A; Plaintiffs' Complaint)

2. Defendant Mueller stated at the scene of the accident that he was "having a manic episode." (Exhibit B; Traffic Accident Report)

3. During discovery it was learned that Defendant Mueller was treating with psychiatrist Dr. Bucknam.

4. It was further learned that Defendant Mueller had seen Dr. Bucknam on the day of the accident.

5. Plaintiffs sought leave to amend their Complaint to add Dr. Bucknam as a party defendant claiming Dr. Bucknam "knew or should have known that Mr. Mueller was suffering from a serious psychiatric disorder...and would pose an increased risk of injury to other persons if he were permitted to drive." (Exhibit C: Plaintiffs' Second Amended Complaint, ¶ ¶ 19-20).

6. Defendant Mueller has exercised his patient-physician privilege thereby barring from evidence inquiry into any aspects of his treatment with Dr. Bucknam including his medical records and discussion of test results, counselling and medications.

7. On March 11, 1997, Plaintiffs filed a Motion to Deem the Patient-Physician Privilege Waived.

8. Defendants Mueller and Bucknam filed responses to same.

9. Concurrent therewith, Defendant Bucknam also filed a Motion to Dismiss given the Plaintiffs' failure to

comply with the Michigan Medical Malpractice Tort Reform Act regarding the notice provisions. MCLA 600.2912b

10. This Honorable Court denied Plaintiffs' Motion to Deem the Patient-Physician Privilege Waived thus barring from evidence introduction of Mr. Mueller's medical records and testimony by Dr. Bucknam about any aspect of Dr. Bucknam's psychiatric treatment of Mr. Mueller. The Court, however, further rules that any matter already disclosed by Mr. Mueller was not privileged; i.e., Mr. Mueller's statement to the police that he was having a "manic episode". (Exhibit D)

11. In an Opinion and Order dated April 21, 1997, the Court denied Defendant Dr. Bucknam's Motion to Dismiss stating, in party, "while Plaintiff cannot maintain a medical malpractice action against Dr. Bucknam, she may pursue a claim sounding in negligence. Under the factual circumstances of this case, a third-party has a claim grounded in negligence against the Defendant based upon that Defendant's relationship with another party." (Exhibit E)

12. While Defendant Dr. Bucknam believes the Court correctly recognized Defendant Mueller's right to exercise his patient-physician privilege and thus restrict from evidence Mr. Mueller's medical records and testimony regarding same, in so doing, it presents a situation in which Dr. Bucknam is unable to receive a fair trial because it is those same records and testimonial evidence about his patient-physician relationship with Mr. Mueller which forms the basis for Dr. Bucknam's defense.

13. The right to present a defense is basic in every lawsuit. People v Colling, 168 NW2d 447; 16 Mich App 574 (1969).

14. Dr. Bucknam's constitutional right to due process is violated by his inability to present pertinent evidence in his defense (i.e., the medical records and

testimony regarding same) to the claims being asserted against him.

15. The Michigan Supreme Court, the Supreme Court of Wisconsin have recognized that it is a fundamental violation of due process to deny a party the opportunity to present pertinent evidence. Dation v Ford Motor Co, 314 Mich 152 (1946); Kelly v Ford Motor Co, 280 Mich 378 (1937); Madison Airport Co v Wrabetz, 231 Wis 147; 285 NW 504 (1938); Minty v Ford Estate, 336 Mich 370 (1993); and Maki v Mohawk Mining Co, 176 Mich 497 (1913).

16. Regardless of whether the Complaint against Dr. Bucknam is considered one of negligence or malpractice, Plaintiffs will have to prove a breach in the applicable standard of care by Dr. Bucknam in this treatment of Mr. Mueller. Welke v Kuzilla, 144 Mich App 245 (1985)

17. Without Dr. Bucknam's office records or testimony regarding his care, treatment and evaluation of Mr. Mueller, there is simply no foundation upon which any expert witness can offer a qualified, credible opinion as to the propriety of Dr. Bucknam's actions in allowing Mr. Mueller to drive.

18. No credible psychiatric witness can offer "expert" testimony in this case without the requisite foundation and knowledge as exists in the medical records and as would be testified to by Dr. Bucknam; any opinions offered without such a foundation would be pure speculation.

19. Board certified psychiatrist Dr. Dan Guyer, who was asked to review what materials could be provided to him regarding this matter, attests that it would be pure speculation for him to render an expert opinion as to whether or not Dr. Bucknam did what a reasonable physician of ordinary learning, skill and judgment would do under the same or similar circumstances without the benefit

of reviewing, at a minimum, Mr. Mueller's medical records. (Exhibit F)

20. Similarly, any psychiatric expert retained by the Plaintiffs would lack the requisite foundation to offer an informed opinion as to the propriety of Dr. Bucknam's actions without the opportunity to review the medical records or testimony regarding that relationship.

21. The United States District Court for the Eastern District of Michigan Southern Division, the Michigan Supreme Court and the Michigan Court of Appeals have all addressed situations where an expert's testimony was based on sheer speculation. In each such situation, the courts have granted summary disposition (or a directed verdict) in favor of the defendant finding the proffered experts' opinions to be inadmissible. Pommella v Regency Coach Lines, Ltd, US Dist Ct ED of Mich So Div, No 93-75459, decided Oct 3, 1995; Amorello v Monsanto Corp, 186 Mich App 324 (1990); Garabedian v William Beaumont Hospital, 450 Mich App 985 (1996); and Bemis v William Beaumont Hospital, 450 Mich App 872 (1995). (A copy of Pommella, supra, is attached as Exhibit G).

22. No Michigan court in a similar situation has both upheld the patient-physician privilege thereby denying access to relevant, foundational medical records and denied summary disposition. Landelius v Rafko, 443 Mich 470 (1996).

23. In the case at bar, the Plaintiffs have asserted a claim based solely upon the patient-physician relationship that existed between Mr. Mueller and Dr. Bucknam and Mr. Mueller's statement at the accident that he was having a manic episode.

24. Recognizing the complaint is based on the premise of that relationship, Dr. Bucknam has a right to defend himself with that relationship.

25. What is used as a sword may also be used as a shield; however, when the shield is taken away from Dr. Bucknam, so is his right to defend himself.

WHEREFORE, Defendant, Dr. Bucknam, respectfully requests that this Honorable Court grant his Motion for Summary Disposition pursuant to the Michigan Constitution, Article II, Section 16; the 14th Amendment to the Federal Constitution; MCR 2.116(C)(10) and the case law cited herein.

Respectfully Submitted,

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